(11)

No. 89-61-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Filiberto Ojeda Rios, et al.

Docketed:
July 14, 1989

Court: United States Court of Appeals
for the Second Circuit

See also:
88-7070

Counsel for petitioner: Solicitor General

Counsel for respondent: Williams,John R., Levy,Margaret P., Sultan,James L., Reeve,Richard A., Polan,Diane, Deutsch,Michael E., Harvey,Richard J., Meyerson,Harold, Kuby,Ronald L.

Entry	Date	Note	Proceedings and Orders
1	Jun 23 1989	G	Application (A88-1042) to extend the time to file a petitic for a writ of certiorari from July 4, 1989 to July 14, 1989, submitted to Justice Marshall.
2	Jun 26 1989		Application (A88-1042) granted by Justice Marshall extending the time to file until July 14, 1989.
3	Jul 14 1989	G	Petition for writ of certiorari filed.
4	Aug 8 1989		Brief of respondents Ivonne Melendez Carrion, et al. in opposition filed.
5	Aug 8 1989	G	Motion of respondents for leave to proceed in forma pauperis filed.
8	Aug 11 1989		Brief of respondents Filiberto Ojeda Rios, et al. in opposition filed.
9	Aug 11 1989	N	Motion of respondents Diaz-Ruiz, Rios, Gonzales-Claudio and Garcia for leave to proceed in forma pauperis filed.
10	Aug 16 1989		DISTRIBUTED. September 25, 1989
11	Sep 1 1989	X	Reply brief of petitioner United States filed.
13	Sep 29 1989		REDISTRIBUTED. October 6, 1989
14	Oct 10 1989		Motion of respondents for leave to proceed in forma pauperis GRANTED.
15	Oct 10 1989		Petition GRANTED.
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16	Oct 21 1989	N	Motion of respondent Ivonne Melendez Carrion for appointment of counsel filed.
17	Oct 21 1989	N	Motion of respondent Angel Diaz-Ruiz for appointment of counsel filed.
18	Oct 24 1989	N	Motion of respondent Isaac Camacho-Negron for appointment of counsel filed.
19	Oct 27 1989	N	Motion of respondent Elias Castro-Ramos for appointment of counsel filed.
20	Nov 6 1989	N	Motion of respondent Jorge Farinacci-Garcia for appointment of counsel filed.
21	Nov 7 1989	N	Motion of respondent Orlando Gonzalez Claudio for appointment of counsel filed.
23	Nov 13 1989		DISTRIBUTED. NOV. 22, 1989. (ABOVE MOTIONS FOR APPOINTMENT OF COUNSEL).
24	Nov 24 1989		Joint appendix filed.
25	Nov 24 1989		Brief of petitioner United States filed.
26	Nov 24 1989		DISTRIBUTED. DEC. 1, 1989. (ABOVE MOTIONS FOR APPOINTMENT OF COUNSEL).

2nd

Entry	Date	Note	Proceedings and Orders
27	Dec 4 1989		The motions for appointment of counsel are granted and it is ordered that Margaret P. Levy, Esq., of Hartford, Connecticut, is appointed to serve as counsel for the respondents in this case.
28	Dec 15 1989		Record filed.
		*	Certified copy of original record and proceedings, 8 boxes, received.
30	Dec 19 1989		Order extending time to file brief of respondent on the merits until January 8, 1990.
31	Dec 27 1989		DISTRIBUTED. Jan. 5, 1990. (Motions for reconsideration of order appointing counsel).
32	Dec 27 1989	G	Motion of respondents Rios, Diamante, Garcia, Ramos, Claudio, Negron, Carrion,Ruiz and Osorio for reconsideration of order appointing counsel and to appoint Richard A. Reeve, Esq. to argue case filed.
33	Dec 27 1989	D	Motion of respondents Garcia, Ramos, Claudio, Negron, Carrion and Ruiz for reconsideration of order appointing counsel and to appoint James L. Sultan, Esq. to brief the case filed.
36	Jan 5 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 28, 1990. (2ND CASE)
37	Jan 5 1990		Brief amicus curiae of National Assn. of Criminal Defense Lawyers filed.
34	Jan 8 1990		Motion of respondents Rios, Diamante, Garcia, Ramos, Claudio, Negron, Carrion,Ruiz and Osorio for reconsideration of order appointing counsel and to appoint Richard A. Reeve, Esq. to argue case GRANTED.
35	Jan 8 1990		Motion of respondents Garcia, Ramos, Claudio, Negron, Carrion and Ruiz for reconsideration of order appointing counsel and to appoint James L. Sultan, Esq. to brief the case DENIED. The order appointing Margaret P. Levy, Esq., entered December 4, 1989, is vacated. Respondents are directed to file a single brief.
38	Jan 8 1990		Brief amici curiae of Asian-American Legal Defense and Education Fund, et al. filed.
39	Jan 8 1990		Order further extending time to file brief of respondent on the merits until January 16, 1990.
41	Jan 16 1990	X	Brief of respondent Isaac Camacho Negron filed.
40	Jan 18 1990		CIRCULATED.
42	Feb 16 1990	X	Reply brief of petitioner United States filed.
43	Feb 22 1990	X	Waiver of right of respondent Filiberto Ojeda Rios to respond filed.
44	Feb 27 1990		ARGUED.

89-6

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

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QUESTION PRESENTED

Whether tape recordings of conversations obtained pursuant to court-authorized electronic surveillance should be suppressed because of a delay in the judicial sealing of the tapes, even if the tapes that are offered into evidence are proved to be the unaltered originals.

PARTIES TO THE PROCEEDING

In addition to the named parties, Hilton E. Fernandez Diamante, Jorge A. Farinacci Garcia, Elias S. Castro Ramos, Orlando Gonzalez Claudio, Isaac Camacho Negron, Ivonne Melendez Carrion, Angel Diaz Ruiz, and Luis A. Colon Osorio are respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 875 F.2d 17. The opinion of the district court suppressing evidence (App., *infra*, 17a-96a) is reported at 695 F. Supp. 649. The opinion of the district court on the government's motion for reconsideration (App., *infra*, 15a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1989. On June 26, 1989, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2518 (18 U.S.C.) provides in relevant part:

* * * * *

(8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

* * * * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

STATEMENT

A 17-count indictment returned in the United States District Court for the District of Connecticut charged respondents and ten others with offenses pertaining to the September 12, 1983, robbery of the Wells Fargo depot in West Hartford, Connecticut.[1] Approximately $7.2 million

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[1] Respondents and their co-defendants were charged with bank robbery, in violation of 18 U.S.C. 2113(a); aggravated bank robbery, in violation of 18 U.S.C. 2113(d); theft from an interstate shipment, in violation of 18 U.S.C. 659; interstate transportation of stolen money, in violation of 18 U.S.C. 2314; interference with commerce by robbery, in violation of 18 U.S.C. 1951; and conspiracy, in violation of 18 U.S.C. 371 and 1951. Of the ten co-defendants who are not respondents in this case, two have pleaded guilty to charges arising out of the indictment, four have been convicted after a jury trial, and one has been acquitted. Three of the ten co-defendants remain fugitives.

was taken during the robbery. Evidence connecting respondents to the robbery was discovered during an investigation of their involvement in a rocket attack on the FBI office in Hato Rey, Puerto Rico. The targets of the investigation, including respondents, were members of a Puerto Rican organization known as "Los Macheteros," the "machete wielders." During the investigation, court-authorized electronic surveillance was conducted at six different locations between April 1984 and August 1985.[2] Following the return of the indictment, respondents moved to suppress all the evidence obtained as a result of the electronic surveillance. App., *infra,* 17a-19a; Gov't C.A. Br. 4-5.

After an eight-month suppression hearing,[3] the district court granted the motion to suppress with respect to conversations recorded at two locations; the court denied the motion in all other respects. App., *infra,* 17a-96a; Gov't

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An additional co-defendant, who was charged in the original indictment but not in the superseding indictment, has been placed on pretrial diversion.

[2] In addition to the interceptions described below, electronic surveillance was also conducted at the residence of two co-defendants in Santurce, Puerto Rico, and at a condominium in Hato Rey, Puerto Rico, that was used by the conspirators. App., *infra,* 20a-21a. The district court did not suppress the tape-recorded conversations obtained as a result of those interceptions, *id.* at 79a, 94a, and the admissibility of that evidence is therefore not at issue here.

[3] The court heard testimony from 20 FBI agents who monitored the recorded conversations, from FBI agents who were involved in presenting the tapes for judicial sealing, from the FBI electronic surveillance clerk who maintained custody of the tapes after interception, from the Department of Justice attorneys who supervised the electronic surveillance investigation, and from defense and government experts who addressed the issue of the authenticity of the tapes. App., *infra,* 17a.

C.A. Br. 3. On the government's appeal, the court of appeals affirmed. App., *infra,* 1a-14a.

1. On April 27, 1984, Chief Judge Perez-Gimenez of the United States District Court for the District of Puerto Rico authorized the FBI to intercept oral communications at the apartment of respondent Filiberto Ojeda Rios in Levittown, Puerto Rico. Ojeda Rios, who had no home telephone, used three public telephones across the street from his apartment. Accordingly, the judge also authorized the interception of wire communications at those telephones. On May 11, 1984, Judge Perez-Gimenez authorized the placement of a microphone in Ojeda Rios's automobile, a Datsun Sentra. The orders for the Datsun and for the Levittown apartment and the public telephones were extended on several occasions. Suspecting that his conversations in Levittown were being intercepted, Ojeda Rios moved from Levittown to the El Cortijo, Puerto Rico, residence of respondent Luis Colon Osorio in July 1984. In light of that move, the FBI ceased monitoring at Levittown on July 9, 1984, although the final extension for the Levittown apartment and telephones did not expire until July 23, 1984. On July 27, the government received authorization to intercept the telephones and to place a microphone in Ojeda Rios's new residence in El Cortijo. The final extension for the El Cortijo order expired on September 24, 1984. App., *infra,* 75a. The final extension for the surveillance of Ojeda Rios's Datsun expired on October 10, 1984. The Levittown, El Cortijo, and Datsun tapes were judicially sealed on October 13, 1984. App., *infra,* 19a-21a, 69a n.8; Gov't C.A. Br. 24-25.

On November 1, 1984, the FBI received authorization to intercept conversations at the Vega Baja residence of defendants Juan Segarra Palmer and Luz Berrios Berrios. The court extended that order each month for seven

months; the last extension expired on May 30, 1985. On January 18, 1985, authorization was also given to intercept conversations at two public telephones near the Vega Baja residence. That order expired on February 17, 1985. The government applied for an extension of the January order on March 1, 1985, and the new order issued on that date. After two more extensions, the final Vega Baja extension expired on May 30, 1985. The tapes of all conversations recorded at the Vega Baja residence and the nearby public telephones were judicially sealed on June 15, 1985. App., *infra,* 21a, 79a-80a; Gov't C.A. Br. 9-10.

2. In their motions to suppress all the conversations intercepted during the investigation, respondents alleged that the tapes were inadmissible because they had not been sealed "immediately," as required by 18 U.S.C. 2518(8)(a). App., *infra,* 17a. During the suppression hearing, respondents also sought to show that the tapes had been altered and were not in their original form. The government offered expert evidence to show that the tapes had not been altered, and it made a detailed showing of the measures that had been taken to preserve the integrity of the tapes. *Id.* at 23a-24a, 31a-35a, 51a-53a. With respect to the judicial sealing requirement, the government showed that Frank Bove, the supervising attorney who was responsible for having many of the tapes sealed, was aware of the statutory sealing requirement, but interpreted the statutory language to mean that the sealing obligation did not arise until all related intercept orders and their extensions had expired. *Id.* at 76a-77a. Accordingly, Bove had arranged for Judge Perez-Gimenez to seal the related Levittown, El Cortijo, and Datsun tapes on October 11 and 13, 1984, at the time of the expiration of the last of the intercept orders for those locations. *Id.* at 35a-36a, 62a. Bove arranged for the sealing of the tapes from the Vega Baja intercepts at the end of May 1985, following the end

of the last extension of the intercept authorization for that location. An administrative error caused a delay of approximately two weeks, and the steps necessary to seal the Vega Baja tapes were not completed until June 12, when Bove asked Judge Perez-Gimenez to seal those tapes. The judge sealed the Vega Baja tapes on June 15, 1985. *Id.* at 85a-86a.

3. At the conclusion of the suppression hearing, the district court admitted some of the tape-recorded conversations and excluded others. With respect to the challenge to the integrity of the tapes, the district court credited the testimony of the government's expert and found that the government had proved by clear and convincing evidence that the tapes being admitted into evidence were in their original form and had not been tampered with. App., *infra,* 55a-61a.

Turning to the issue of the delays in the judicial sealing of the tapes, the district court held that the obligation to seal the 455 tapes from the oral and wire interceptions at Levittown arose on July 23, 1984, when the final extension of the original Levittown order expired. The court rejected the government's argument that the El Cortijo order was an extension of the Levittown order because the change in location was required by the movement of the target, respondent Ojeda Rios. The court thus rejected the government's contention that the sealing obligation for the Levittown tapes did not ripen until September 24, 1984, when the final El Cortijo extension expired. App., *infra,* 67a-69a. Accordingly, the court found that there had been at least an 82-day delay in sealing from July 23 to October 13, when the Levittown tapes were judicially sealed.[4] *Id.* at

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[4] Although the interception at Levittown was discontinued several days before the Levittown intercept order expired, the court found it

63a-65a. The court found this delay to be "excessive as a matter of law" and held that it required the automatic suppression of all the Levittown tapes, regardless of whether the government could prove that those tapes had not been altered (and thus that the delay in sealing did not affect the integrity of the tapes). *Id.* at 66a. The court noted that because it was suppressing the Levittown tapes, it was not necessary to decide whether the integrity of those tapes had been maintained. *Id.* at 30a n.3.

The court refused to suppress the El Cortijo tapes, although there was a 19-day delay in sealing those tapes, because (1) the tapes were "pristine" (App., *infra,* 76a); (2) the sole cause of the delay was attorney Bove's misunderstanding of the statutory sealing requirement; (3) Bove diligently sought sealing once he believed the statutory obligation had ripened; and (4) respondents were not prejudiced by the delay. *Id.* at 72a-79a.

Turning to the Vega Baja public telephone tapes, the court held that the obligation to seal the tapes made pursuant to the initial intercept order ripened on February 17, 1985, when that order expired. The court acknowledged that the initial order was extended several times, but it held that the extensions could not postpone the sealing obligation unless the government provided a "satisfactory explanation" for the 12-day hiatus between the expiration of the original order and the first extension. The court held that the government's explanation for this delay—that the government was attempting to revise the underlying affidavit on which the Vega Baja applications were based—was not satisfactory. App., *infra,* 82a-83a. Accordingly, the court calculated that 118 days had expired between the expiration of the original Vega Baja public telephone

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unnecessary to decide which event triggered the obligation to have the court seal the tapes. App., *infra,* 63a-66a.

order on February 17, and June 15, when all the Vega Baja tapes were sealed. The court held that this delay was "excessive as a matter of law," and it suppressed the Vega Baja public telephone tapes that had been obtained pursuant to the January 18 order. *Id.* at 83a.

The court did not suppress the remaining Vega Baja tapes, despite the 16-day delay (from May 30 to June 15) in sealing those tapes. The court reasoned that suppression was not required because the government had proved by clear and convincing evidence that the tapes had not been altered and because respondents were not prejudiced by the delay, which was the result of a good faith misunderstanding between the prosecutor and the FBI as to who would initiate the sealing process. App., *infra,* 84a-88a. The court specifically found that the government had not used the 16-day delay "to tamper with the tapes or in any way use the tapes to gain some advantage." *Id.* at 84a.

4. The government appealed the suppression of the Levittown tapes and the Vega Baja public telephone tapes that were recorded pursuant to the January 18, 1985, intercept order. The court of appeals affirmed. App., *infra,* 1a-14a. The court observed that when tapes are not sealed within one or two days after the expiration of a wiretap order, the government bears the burden of offering a satisfactory explanation for the delay as a prerequisite to the tapes' admissibility. *Id.* at 7a. The court disagreed with those circuits that "excuse sealing delays simply upon proof of the integrity of the tapes." *Id.* at 8a.[5]

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[5] The court cited cases from the Third, Fifth, Seventh, and Eighth Circuits as examples of the approach it rejected: *United States* v. *Falcone,* 505 F.2d 478, 484 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States* v. *Diadone,* 558 F.2d 775, 780 (5th Cir. 1977), cert. denied, 434 U.S. 1064 (1978); *United States* v. *Cohen,* 530 F.2d 43, 46 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *United States* v. *Angelini,* 565 F.2d 469, 471 (7th Cir. 1977), cert. denied, 435 U.S.

The court of appeals agreed with the district court's conclusion that there had been a delay of at least 82 days in sealing the Levittown tapes. App., *infra,* 11a. Although it did not agree with the district court's conclusion that the Levittown tapes should be suppressed "on the basis of time alone," *id.* at 11a-12a, the court nevertheless concluded that suppression was required. In light of the length of the delays in sealing, the court found that the government's explanation was not "satisfactory," because it "resulted from a disregard of the sensitive nature of the activities undertaken." *Id.* at 12a.[6]

With respect to the Vega Baja public telephone tapes, the court of appeals agreed with the district court that the government was required to provide a "satisfactory explanation" for the 12-day hiatus between the expiration of the January 18 order on February 17, 1985, and the issuance of the March 1 extension order. The court of appeals also agreed with the district court that the government's explanation for that delay was insufficient. App., *infra,* 14a. The court therefore concluded that the March 1 surveillance order was not an "extension" of the January 18 order, but was instead a new and independent order. For that reason, the court concluded that the tapes obtained pursuant to the January 18 order should have been sealed shortly after February 17, rather than in June, after the expiration of the subsequent Vega Baja intercept orders. The court of appeals therefore agreed with the district court that there had been a 118-day delay in sealing the tapes recorded pursuant to the first Vega Baja telephone order. Because it found that delay unjustified, the court agreed with the district court that the products of the January 18 order had to be suppressed. *Id.* at 14a.

923 (1978); *United States* v. *Lawson,* 545 F.2d 557, 564 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *McMillan* v. *United States,* 558 F.2d 877, 879 (8th Cir. 1977).

[6] Although the court agreed that the same mistaken interpretation of law that led to the delay in sealing the Levittown tapes "might help to excuse the nineteen-day delay [found acceptable] in respect to the later El Cortijo tapes," it imposed a higher standard for the longer delay. App., *infra,* 13a.

REASONS FOR GRANTING THE PETITION

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, establishes specific procedures for electronic surveillance of oral and wire communications. Under the terms of the statute, recordings of intercepted conversations must be sealed under the direction of a judge "[i]mmediately upon the expiration of the period of the [electronic surveillance] order, or extensions thereof." 18 U.S.C. 2518(8)(a). The question in this case is whether a delay in the judicial sealing of the tapes should result in suppression, even if the evidence establishes that the tapes have not been altered. The courts of appeals are divided on that question, and this case provides an appropriate vehicle for resolving that conflict.

The issue is important because, despite the best efforts of supervising attorneys, there will from time to time be situations where tapes will not be sealed "immediately" on termination of an intercept order. As this case demonstrates, these inadvertent failures are particularly likely to occur in the course of complex investigations, involving interrelated surveillances. It is precisely such investigations, which often lead to important criminal prosecutions, in which the suppression of properly intercepted and protected tapes can be most devastating. Moreover, uncertainty about the applicable standards can complicate the issues that must be litigated in connection with motions to suppress wiretap evidence. A decision by this

Court clarifying those standards will thus help ease the burdens imposed by complex criminal cases on both the courts and the parties.

1. The courts below did not conclude that the sealing delays resulting from attorney Bove's misunderstanding of the statutory sealing requirement violated any right guaranteed by the Constitution. Nor did the lower courts conclude that the delays harmed respondents in any way. Instead, relying on language in 18 U.S.C. 2518(8)(a), the courts deemed the tapes inadmissible solely because the government failed to offer a "satisfactory explanation" for the delays.

Neither the statute nor its legislative history supports this result. By its terms, Section 2518(8)(a) requires a "satisfactory explanation" only for the "absence" of a judicial seal. Significantly, Congress did not mandate suppression as the required remedy when the tapes are sealed but sealing is delayed. In fashioning a remedy for sealing delays, the courts should be guided by the purposes of the sealing requirement. The principal purpose of that requirement is "to insure that accurate records will be kept of intercepted communications." S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968). See *United States* v. *Mora*, 821 F.2d 860, 867 (1st Cir. 1987); *United States* v. *Diana*, 605 F.2d 1307, 1314 (4th Cir. 1979), cert. denied, 444 U.S. 1102 (1980); *United States* v. *Lawson*, 545 F.2d 557, 564 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *United States* v. *Falcone*, 505 F.2d 478, 483 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).[7] Accordingly, a delay in sealing should not result in the suppression of evidence if the court is satisfied that the tapes offered into evidence were not tampered with and therefore accurately represent the conversations that were intercepted.[8]

[7] A second and related purpose of Section 2518(8)(b) is to protect the information in the recordings from unauthorized disclosure (see S. Rep. No. 1097, *supra*, at 105). That purpose is accomplished by the use of careful custodial procedures of the sort the FBI employed in this case. See App., *infra*, 30a-36a. There is no suggestion that the sealing delays led to any unauthorized disclosure of the suppressed tapes in this case.

This conclusion is buttressed by Section 2518(10)(a), the principal suppression provision of Title III. Under Section 2518(10)(a), suppression is reserved for the "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States* v. *Donovan*, 429 U.S. 413, 433-434 (1977), quoting *United States* v. *Giordano*, 416 U.S. 505, 527 (1974). Section 2518(10)(a) thus prohibits the use of evidence obtained in violation of the pre-interception procedures and minimization requirements of Title III—the provisions that protect Fourth Amendment privacy interests. See S. Rep. No. 1097, *supra*, at 66, 103. But suppression has not been required in the case of violations of statutory requirements that were not designed to protect privacy by restricting the use of electronic surveillance. Thus, the Court has held that suppression is inappropriate for violations such as (1) misidentification of the authorizing Department of Justice official in the warrant application (*United States* v. *Giordano*, *supra*); (2) failure to list in the application every individual whose conversations the government expects to intercept during the electronic surveillance (*Donovan*, 429 U.S. at 435-547); and

[8] The Senate Report recognizes that judicial sealing is not sufficient, standing alone, to ensure the integrity of the tape recordings. The Report suggests that "[a]ppropriate procedures should be developed to safeguard the identity, physical integrity, and contents of the recordings to assure their admissibility in evidence." S. Rep. No. 1097, *supra*, at 104. The Report thus indicates that Congress regarded the integrity of the tapes as the keystone to their admissibility.

(3) failure to inform the authorizing judge of all identifiable persons whose conversations were intercepted (429 U.S. at 438-439).

Like other post-interception procedures, the sealing requirement does not limit the use of electronic surveillance.[9] Thus, an unexplained delay in sealing does not make the tapes subject to suppression under 18 U.S.C. 2518(10). See *United States* v. *Falcone*, 505 F.2d at 484. And Section 2518(8) provides for suppression only when there has been a complete failure to obtain judicial sealing and there is no satisfactory explanation for the failure. In light of the express limitations on the scope of required suppression in Sections 2518(8) and 2518(10), it is unlikely that Congress intended to create, by implication, a remedy of mandatory suppression for a delay in sealing, a violation that does not fall within either of the two statutory suppression provisions.

The requirement of immediate sealing is best viewed as an evidentiary rule that implements one of the devices Congress selected to assure that taped conversations to be admitted in evidence will be accurate. Accuracy should be assumed if the tapes are sealed "immediately" upon the conclusion of surveillance. If there is a delay in sealing, the tapes nevertheless should be admitted if the government can prove that they were not tampered with or otherwise altered during the period of delay.

2. As the court of appeals candidly acknowledged, most courts have concluded that recorded conversations are admissible despite sealing delays if the government proves that the tapes have not been altered. See, *e.g.*,

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[9] As the Court recognized in *Donovan*, even where there has been a lack of total compliance with a post-interception procedure, the conversations have nevertheless been " 'seized' under a valid intercept order." 429 U.S. at 438.

United States v. *Angelini*, 565 F.2d 469 (7th Cir. 1977), cert. denied, 435 U.S. 923 (1978); *United States* v. *Diadone*, 558 F.2d 775, 780 (5th Cir. 1977), cert. denied, 434 U.S. 1064 (1978); *United States* v. *Lawson*, 545 F.2d 557, 564 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *United States* v. *Cohen*, 530 F.2d 43, 46 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *United States* v. *Sklaroff*, 506 F.2d 837, 840-841 (5th Cir.), cert. denied, 423 U.S. 874 (1975); *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States* v. *Vastola*, 670 F. Supp. 1244, 1282 (D.N.J. 1987). Cf. *McMillan* v. *United States*, 558 F.2d 877, 879 (8th Cir. 1977) (refusing to consider collateral attack alleging sealing delay since defendant did not challenge the integrity of the tapes).

The Third Circuit has held that "where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom." *Falcone*, 505 F.2d at 484. The "crucial factor," that court observed, "is the integrity of the tapes." *Ibid.* The Fifth Circuit has employed a similar approach. As that court explained, the purpose of the statutory requirement of immediate sealing "is to safeguard the recordings from editing or alteration." *Sklaroff*, 506 F.2d at 840. Therefore, where there is "no showing that the integrity of the interceptions was in any way violated," *ibid.*, the evidence should be admitted.

The Seventh Circuit uses a somewhat different approach, but with respect to the issue of suppression it takes the same position as the Third and Fifth Circuits. In the case of a sealing delay, the Seventh Circuit employs a two-part analysis: it first looks to whether the government has offered a satisfactory explanation for the delay. If so, the inquiry does not proceed farther. If not, the court must

inquire whether the purposes of the sealing requirement have been undermined and suppression required as a result. *Angelini,* 565 F.2d at 471. Even absent a satisfactory explanation for the delay, the Seventh Circuit permits the evidence to be admitted if "the Congressional purposes underlying the sealing requirement were met" despite the delay, *i.e.,* if "there is no substantial question raised about the integrity of the tapes." *Id.* at 473.

The Second Circuit has adopted a far more restrictive approach, severely limiting the circumstances in which demonstrably unaltered tapes can be admitted into evidence where there has been a lengthy sealing delay.[10] In this case, for example, the court held that, where the delays were substantial, the government could not defeat respondents' suppression motions by proving that the tapes had not been altered. While disclaiming exclusive reliance on the length of the delay, the Second Circuit apparently regarded the length of the delay as the crucial factor. As we previously indicated, the sealing delays for the suppressed Levittown tapes and the admitted El Cortijo tapes both resulted from attorney Bove's misunderstanding of the statutory requirement. In addition, both sets of tapes were afforded identical protection against tampering, and samples from the Levittown tapes were included in those subjected to expert analysis and found unaltered.

[10] Several circuits, including the court of appeals in this case (App., *infra,* 8a), have noted the conflict between the approach taken by the Second Circuit and the less restrictive approach embraced by other courts. See, *e.g., United States* v. *Diana,* 605 F.2d at 1314 (noting conflict among the circuits, but finding it unnecessary to decide whether integrity of the tapes alone is sufficient to defeat a motion to suppress for delay in sealing); *United States* v. *Angelini,* 565 F.2d at 473 n.7 (Second Circuit's approach "inexplicably elevates the immediate sealing requirement to a more protected status than any of the other procedural requirements enacted in Title III").

The only arguably relevant difference between the two is that the delays were substantially longer for the Levittown tapes, which were suppressed, than for the El Cortijo tapes, which were not. App., *infra,* 13a, 66a, 76a-78a.[11]

In an earlier case, *United States* v. *Massino,* 784 F.2d 153, 158-159 (1986), the Second Circuit set forth specific procedures and remedies for sealing delays. The court directed that in all future cases, tapes must be sealed within two days of the expiration of the wiretap order. If sealing is completed in more than two days but less than five days, the government must, at the time of sealing, file an explanation with the court *in camera,* with supporting affidavits, as to the reasons for the delay. If the delay exceeds five days, the government must move for an extension of time within which to obtain judicial sealing. In that motion, the government must set forth the reason for the delay and attach supporting affidavits. The court warned that "[a] failure by the government to follow this procedure will of course undermine any claim of satisfactory explanation." *Id.* at 159.[12]

The instant case tellingly demonstrates why it is wrong to attach such great weight to the length of the delay, even when the tapes are shown to be unaltered. The delay in sealing the Levittown tapes was the product of the supervising attorney's misunderstanding of when the obligation

[11] Although the district court declined to make findings as to the integrity of the suppressed Levittown tapes, that does not affect the analysis of this case, since the district court and the court of appeals concluded that suppression was required even assuming the suppressed tapes were as pristine as those admitted into evidence.

[12] The *Massino* standards were not applied by their terms in this case, because the investigation was completed before *Massino* was decided.

to seal ripened.[13] And the delay in sealing the Vega Baja tapes was the product of the attorney's belief that the March 1 Vega Baja intercept order was an extension of the January 18 order, even though there was a 12-day hiatus between the two interceptions. Those two legal errors resulted in virtually the entire delay in this case; the case was not one in which the delay was attributable to lackadaisical performance on the part of the agents or the supervising attorney, and in which each passing day of delay could be regarded as reflecting an increasing degree of fault.

Similarly, the supervising attorney would not have had reason to believe he should take curative steps of the kind required by the Second Circuit in *Massino*. He had no reason to believe that he needed to provide the district court with a contemporaneous explanation of the reasons for his delay, nor did he have any reason to believe he needed to apply for an extension of time within which to seal the tapes. Compliance with *Massino* is simply impossible whenever the government mistakenly believes that it is not yet required to obtain judicial sealing.

This case also demonstrates that the *Massino* procedures are not needed to "create an incentive for the government to give priority to sealing" (784 F.2d at 159). The consequence of the government's delay in presenting the tapes for judicial sealing in this case was an eight-

[13] For purposes of this case, we do not challenge the court of appeals' conclusion that the supervising attorney was legally wrong in believing that the Levittown tapes could be sealed after the termination of the related El Cortijo and Datsun intercept orders, and in believing that the Vega Baja intercept orders for March, April, and May of 1985 were extensions of the January 18 Vega Baja intercept order. Nonetheless, as we note below (notes 14-15, *infra*), the attorney's views on those matters, even if incorrect, were not unreasonable.

month suppression hearing at which the government bore the burden of proving by clear and convincing evidence that the tapes had not been altered. In contrast to the enormous amount of time and effort required to prove the integrity of the tapes, presenting them for prompt judicial sealing would have occasioned only minimal effort. The government clearly needs no additional incentive to attend faithfully to the statutory requirement of prompt sealing.

3. The First Circuit agrees with the Second Circuit that the statutory requirement of a "satisfactory explanation" (Section 2518(8)(a)) applies not only to the absence of a seal, but also to delays in sealing, and that proof that the tapes are in their original form is not necessarily sufficient to justify their admission. *United States* v. *Mora*, 821 F.2d 860, 866-869 (1st Cir. 1987). In evaluating the government's explanation for sealing delays, the First Circuit has held that a court should "look first—and most searchingly—at whether the government has established by clear and convincing evidence that the integrity of the tapes has not been compromised." *Mora*, 821 F.2d at 867. But the court also observed that "warranties of driven snow purity, proven beyond peradventure, will not suffice to constitute a 'satisfactory explanation.' " *Id.* at 868. In addition, the court identified a number of other factors to be considered in evaluating the adequacy of the government's explanation for a sealing delay: prejudice to the defendant, benefit to the government, the length of the delay, and the cause of the delay. *Id.* at 868-869.

Even under the First Circuit's approach, however, there is no reason to suppress here. First, "the delay in presenting the tapes for judicial sealing came about in good faith." *Mora*, 821 F.2d at 868. The *Mora* court explained that requirement as having two components: lack of prejudice to the accused and lack of unfair benefit to the gov-

ernment. *Ibid.* Respondents have not asserted that they were prejudiced by the delay, nor did the delay result in any unfair advantage to the government. Indeed, it is hard to imagine any way in which a sealing delay that did not result in tampering could either prejudice a defendant or give the government an unfair advantage.

The *Mora* court also considered the cause of the delay, distinguishing between "[a]n explanation * * * reflective of gross dereliction of duty or wilful disregard for the sensitive nature of the [surveillance]" and one in which "the cause of the delay is inoffensive—for example, if the retardment was realistically beyond the control of the law enforcers, or arose out of honest mistake." 821 F.2d at 869. The delays here were clearly of the latter type. They did not result from carelessness, failure to give appropriate priority to the sealing requirement, or other sanctionable behavior. Rather, with respect to both the suppressed Levittown and Vega Baja tapes, the delay was caused by the supervising attorney's honest misunderstanding of when the obligation to seal arose. The attorney reasonably believed that judicial sealing was unnecessary until all related orders and extensions had expired.[14] Sole-

[14] The attorney's interpretation of the statute was almost identical to the Second Circuit's reading of the statute in *United States* v. *Principie*, 531 F.2d 1132 (1976), cert. denied, 430 U.S. 905 (1977). Under Section 2518(8)(a) and (d), both the sealing requirement and the notification requirement ripen upon the expiration of the electronic surveillance order, or "[a]ny extensions thereof." In *Principie*, the court held that for notification purposes, an order is extended if the target is the same but the location of the surveillance has changed because the target moved to evade detection. Under this definition of "extension," the surveillance at El Cortijo was plainly an extension of the surveillance at Levittown, because respondent Ojeda Rios was the primary target of the surveillance at each location, and the Levittown surveillance was abandoned only because he had moved to El Cortijo to evade detection. Therefore, *Principie* could reasonably be read to

ly because of that one error, he did not seek judicial sealing for the Levittown tapes until the El Cortijo and Datsun orders and extensions had expired. The attorney's failure to initiate the sealing of the first set of Vega Baja public telephone tapes until after the final extension order for those telephones expired was at least equally reasonable. Because there was a 12-day hiatus between the expiration of the initial order on February 17, 1985, and the issuance of the extension on March 1, 1985, the court of appeals upheld the district court's refusal to treat the March 1 order as an extension of the initial order.[15] Like the dis-

indicate that the sealing obligation for the tapes relating to Ojeda Rios's successive residences did not ripen until the El Cortijo tapes were completed. Even though the court below ultimately refused to adopt that reading of *Principie* (App., *infra*, 10a-11a), it was nevertheless a reasonable one at the time the attorney had to decide when to present the tapes for sealing. His decision to wait until the expiration of the El Cortijo surveillance was thus objectively reasonable, even if ultimately incorrect. It was, at worst, an "honest mistake." *Mora*, 821 F.2d at 869.

[15] The district court candidly recognized (App., *infra*, 82a-83a) that "[t]he March 1, 1985 order covered the same telephones, concerned the same crimes, and targeted the same individuals as the * * * initial order. Thus, it was an extension of the first as the term has been defined in [*United States* v.] *Vazquez*, 605 F.2d [1269,] 1278 [(2d Cir.), cert. denied, 444 U.S. 981 (1979)]." On this point *Vazquez* is in accord with the universal view. But the district court then applied unique Second Circuit precedent (*United States* v. *Gigante*, 538 F.2d 502 (1976)) to require a satisfactory explanation for the delay in obtaining the extension order. Finding the explanation unsatisfactory, the district court refused to treat the March 1 order as an extension for purposes of the sealing requirement. The effect of this analysis was to require those responsible for this investigation in the First Circuit to predict the eventual outcome of the application of the special Second Circuit rule in determining whether the subsequent order will be considered an extension for purposes of the sealing requirement. Although the court of appeals' analysis is less clear (App., *infra*, 13a-14a), it apparently followed the same route.

trict court, the court of appeals found the government's explanation for the 12-day hiatus insufficient. App., *infra,* 13a-14a, 82a-83a. But the statute, which places no time limit at all on seeking an extension, certainly does not require any explanation for a delay in obtaining one. See 18 U.S.C. 2518(5). In short, the supervising attorney, who was conducting an investigation in the First Circuit, not the Second, was faulted for failing to apply the special Second Circuit analysis and to conclude that the first group of Vega Baja tapes should have been sealed in February 1985.

Finally, the First Circuit in *Mora* looked to the length of the delay. But unlike the Second Circuit, the First Circuit apparently finds this factor significant only because of its effect on the others (821 F.2d at 868-869): "[t]he longer the delay, the greater looms the danger of adulteration; the longer the delay, the harder it may become to show, say, good faith or the absence of undue prejudice. And the lengthier the delay, the more difficult to find the government's explanation 'satisfactory.' " From this perspective, the "length of the delay" factor does not require suppression here, since there was no alteration of the tapes, no prejudice or lack of good faith, and the cause of the delay was in both instances a perfectly reasonable misunderstanding of the point at which the obligation to present the tapes for sealing arose.

In sum, under the test applied by any court other than the Second Circuit, the sealing delays in this case would not have resulted in the suppression of evidence. This Court should grant review to resolve the conflict among the circuits on the proper standard to be used in determining when a delay in sealing the products of court-authorized electronic surveillance should lead to suppression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 486—August Term, 1988
Docket No. 88-1341

UNITED STATES OF AMERICA, APPELLANT,

v.

FILIBERTO OJEDA RIOS, HILTON E. FERNANDEZ DIAMANTE, JORGE A. FARINACCI GARCIA, ELIAS S. CASTRO RAMOS, ORLANDO GONZALEZ CLAUDIO, ISAAC CAMACHO NEGRON, IVONNE MELENDEZ CARRION, ANGEL DIAZ RUIZ, LUIS A. COLON OSORIO, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

T. EMMET CLARIE, District Judge, Presiding

Argued January 19, 1989
Decided May 5, 1989

Before: OAKES, Chief Judge, LUMBARD and FEINBERG, Circuit Judges.

OAKES, Chief Judge:

This is an appeal by the Government from an order of the United States District Court for the District of Connecticut, T. Emmet Clarie, Judge, suppressing certain electronic surveillance evidence under 18 U.S.C. § 2518(8)(a) (Supp. V 1987). Section 2518 regulates the procedure for the interception of electronic communica-

tions. It permits surveillance under the authority of an order from a judge. In general, tape recordings of the communications should be made. Then, "[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." 18 U.S.C. § 2518(8)(a). This is no mere technical requirement. Rather, the sealing provision embodied in section 2518(8)(a) was a matter of fundamental concern underlying the electronic surveillance statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211 (codified as amended at 18 U.S.C. § 2510 et seq.) ("Title III"). Subsection 2518(8)(a) makes the presence of the seal, "or a satisfactory explanation for the absence thereof," a "prerequisite for the use or disclosure of the contents of any wire . . . or electronic communication or evidence derived therefrom." This is an independent suppression remedy, distinct from that contained in section 2518(10)(a). *United States v. Mora*, 821 F.2d 860, 866 (1st Cir. 1987).

The Supreme Court emphasized the importance of Title III's requirements when it construed section 2518(10)(a)'s suppression provisions in *United States v. Giordano*, 416 U.S. 505, 527 (1974):

> [W]e think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

We believe that these words apply with equal force to the suppression provision in section 2518(8)(a). Furthermore,

the technological advances that have occurred in the fifteen years since the *Giordano* decision, *see* G. Marx, *Undercover: Police Surveillance in America* 206-33 (1988) ("*Undercover*"), render the Court's views in that case all the more pertinent.

For reasons that will appear below, we affirm the decision of the district court insofar as it suppressed 344 tapes of surveillance on telephones at Levittown, Puerto Rico (the "Levittown tapes") and thirty-four tapes from electronic surveillance at certain telephones in Vega Baja, Puerto Rico ("the Vega Baja tapes").

BACKGROUND

Following a rocket attack on the federal building and United States courthouse in Hato Rey, Puerto Rico, the Government obtained an order of electronic surveillance effective April 27, 1984, for the residence of defendant Filiberto Ojeda Rios ("Ojeda") in Levittown, Puerto Rico, and for a bank of public telephones near his residence. At some time during the surveillance, the Government had reasoned to believe that those connected with that attack were also involved in the robbery of the Wells Fargo depot in West Hartford, Connecticut. That robbery is the subject of an indictment, and we consider here the district court's suppression of tapes that the Government has designated as trial exhibits.[1]

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[1] Reported decisions involving the defendants' pretrial detention are *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986); *United States v. Berrios Berrios*, 791 F.2d 246 (2d Cir.), *cert. dismissed*, 479 U.S. 978 (1986); *United States v. Gonzalez Claudio*, 806 F.2d 334 (2d Cir. 1986); *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987), *reh'g denied*, 837 F.2d 61 (2d Cir. 1988); *United States v. Ojeda Rios*, 846 F.2d 167 (2d Cir. 1988); *Ojeda Rios v. Wigen*, 863 F.2d 196 (2d Cir. 1988); and *In re Ojeda Rios*, 863 F.2d 202 (2d Cir. 1988). Attorney fees were addressed in *United States v.*

The Government obtained two extensions of the April 27, 1984, order covering Ojeda's residence and the nearby public telephones in Levittown. The final extension expired on July 23, 1984, but the Government actually terminated the surveillance on July 9, 1984, a few days after Ojeda moved out of the apartment and ninety-six days before the tapes were judicially sealed on October 13, 1984. The date of sealing of the Levittown tapes was eighty-two days after the expiration of the final extension order.

Meanwhile, however, the Government had obtained a new surveillance order on July 27, 1984, relating to Ojeda's new residence in El Cortijo, an urban community within a municipality adjacent to Levittown. That order, which will be called the El Cortijo order, expired on September 24, 1984. Between the time of the expiration of the Levittown order and its extensions and the issuance of the El Cortijo order, there was a lapse of only four days. Between the time of the expiration of the El Cortijo order and its extensions on September 24, 1984, and the order of sealing on October 11, 1984, there was a lapse of seventeen days. The district court held, however, that the Levittown electronic surveillance was not extended by the El Cortijo electronic surveillance order and that accordingly the court did not have to determine whether the duty to seal the Levittown tapes arose on July 9, 1984, the date that the Government ceased operating its equipment at Levittown, or on July 23, 1984, the date of expiration of the last Levittown extension order. In either case, the court ruled, the tapes were suppressed "on the basis of time alone." The court ruled, on the other hand, that the seventeen-day

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Melendez-Carrion, 804 F.2d 7 (2d Cir.), *cert. dismissed*, 479 U.S. 978 (1986), and *United States v. Melendez-Carrion*, 811 F.2d 780 (2d Cir. 1987). *See also United States v. Gerena*, 1989 WL 14035 (2d Cir. Feb. 17, 1989) (concerning use in publicly filed briefs of information gained through surveillance).

sealing delay applicable to the El Cortijo tapes themselves was satisfactorily explained because the tapes were immaculate, the delay came about in good faith, and the delay was not excessive. Thus our first question is whether the El Cortijo surveillance was in fact a continuance of the Levittown surveillance. We then must determine, if it was not, whether the surveillance evidence was suppressible on the facts of this case where there was a sealing delay in connection with the Levittown tapes of either eighty-two or ninety-six days, as the case may be.

The Vega Baja tapes relate to orders of authorization to wiretape two public telephones outside a pharmacy in Vega Baja. The first order was obtained on January 18, 1985, and expired on February 17, 1985. The Government obtained a new wiretape order, based on a revised affidavit, on March 1, 1985. This order was extended twice, the final extension expiring on May 30, 1985. All the tapes derived from the Vega Baja telephone taps were then sealed on June 15, 1985. The Government claimed before the district court that the order of March 1, 1985, was an extension of the January 18, 1985, order, but the court was not satisfied with the Government's explanation, holding that the revised affidavit ought to have been completed "in a more expeditous [*sic*] manner." This led the court to conclude that the sealing delay for the Vega Beja tapes derived from the January 18, 1985, order was 118 days. It considered this delay excessive and suppressed these tapes "on the basis of time alone." The sealing delay for all of the other Vega Beja telephone tapes was sixteen days. The district court found that this sixteen-day delay was satisfactorily explained, again on the basis of the immaculacy of the tapes and the fact that the delay came about in good faith and was not excessive. Thus, with respect to the tapes created during the first Vega Baja telephone order of January 18, 1985, the first question is whether the March 1, 1985, order was an extension of the

prior order. If it was not, then we must decide whether the 118-day sealing delay was satisfactorily explained on the facts of this case.

It should be noted that the district court specifically stated in footnote 3 of its ruling that it made no specific findings with respect to the physical integrity of either the Levittown tapes or the Vega Baja tapes. In a motion for clarification and reconsideration, the Government contended that this was inconsistent with the substance of the court's rulings. The district court denied the motion to reconsider footnote 3. The appellees make the point that even if we were to reverse the district court's orders of suppression and to remand for further findings, serious questions of authenticity and integrity would remain for determination and independent grounds for suppression would be at issue on appeal. These include the Government's alleged use of a secret recording system, its alleged deliberate destruction of tapes containing original material, and its alleged practice of eavesdropping without recording.

DISCUSSION

The Law Governing Sealing Delays

This court made it clear in *United States v. Gigante,* 538 F.2d 502 (2d Cir. 1976), agreeing with the dissent of Judge Rosenn in *United States v. Falcone,* 505 F.2d 478 (3d Cir. 1974), *cert. denied,* 420 U.S. 955 (1975), that "a satisfactory explanation is required, not only for total failure to seal the tapes, but for failure to seal the tapes 'immediately' as well. . . . [A]ny other interpretation 'would completely undercut the statutory purpose of protecting the integrity of the tapes.' " *Gigante,* 538 F.2d at 507 (quoting *Falcone,* 505 F.2d at 486 n.5 (Rosenn, J., dissenting)). Our decisions have fully recognized the importance of the integrity

of the underlying tape, an importance that in an era of increasingly sophisticated techniques cannot be overemphasized. *See Undercover* at 135-36 (describing "editing" techniques such as erasing, losing or not reporting a tape, neglecting to activate the recording device, claiming that the device malfunctioned or could not be used for security reasons, and speaking inaudibly; and noting that "careful linguistic analysis" is required to combat strategies by which innocent people may be made to appear guilty on tape). We recognize that the sealing requirement, as established by the statute and construed by the courts, does not guarantee the integrity of tape recordings. *E.g., United States v. Massino,* 784 F.2d 153, 156 (2d Cir. 1986). Nevertheless, the requirement that tapes be sealed immediately upon expiration of an order contributes to the congressional purpose of minimizing the risk of tampering. We have held that one or two days is generally sufficient to carry out the sealing process. *United States v. Vazquez,* 605 F.2d 1269, 1278 (2d Cir.) ("a sealing achieved one to two weeks after expiration of a wiretap cannot be considered 'immediate' "), *cert. denied,* 444 U.S. 981 (1979).

The First Circuit has pointed out that the sealing requirement, in the congressional language, "shall be a prerequisite for admission of evidence from a wiretap. *Mora,* 821 F.2d at 866. The court went on to say:

> This wording is crystal clear. It leaves no room to waffle. . . . [It] is both forthright and apt . . . in the most unambiguous of terms . . . a choice of the sort which courts must honor.

Id. Our court and the First Circuit agree that the Government thus has a burden to offer the statutory "satisfactory explanation" for any sealing delay. *Id.* at 867-69; *Massino,* 784 F.2d at 156. Because not every failure to comply with

the wiretap statute requires suppression of the resultant evidence, *United States v. Donovan*, 429 U.S. 413, 433-34 (1977); *United States v. Chavez*, 416 U.S. 562, 574-75 (1974), the excusatory provision of section 2518(8)(a) should be viewed in light of the extent to which immediacy of sealing is " 'a central or functional safeguard in Title III's scheme to prevent abuses,' " *Mora*, 821 F.2d at 866 (quoting *United States v. Diana*, 605 F.2d 1307, 1312 (4th Cir. 1979) (quoting *United States v. Chun*, 503 F.2d 533, 542 (9th Cir. 1974)), *cert. denied*, 444 U.S. 1102 (1980)). Thus, we disagree with those courts that excuse sealing delays simply upon proof of the integrity of the tapes. *See United States v. Angelini*, 565 F.2d 469, 471 (7th Cir. 1977) (if there is no satisfactory explanation for a sealing delay, court should consider whether statutory purpose of preserving tapes' integrity was satisfied, whether sealing requirement was deliberately ignored, and, if so, whether any tactical advantage was gained), *cert. denied*, 435 U.S. 923 (1978); *McMillan v. United States*, 558 F.2d 877, 879 (8th Cir. 1977) (per curiam) (denying habeas relief for federal prisoner, who alleged that sealing requirement had been violated, because integrity of tapes was indisputed); *United States v. Diadone*, 558 F.2d 775, 780 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *United States v. Lawson*, 545 F.2d 557, 564 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976); *United States v. Cohen*, 530 F.2d 43, 46 (5th Cir. 1976), *cert. denied*, 429 U.S. 855 (1976); *United States v. Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); *United States v. Vastola*, 670 F. Supp. 1244, 1282 (D.N.J. 1987).

The Sealing Delays in This Case

Measuring the length of the sealing delays for both sets of tapes depends first on whether or not the later orders

were extensions of the earlier ones. We will take up the two sets of tapes separately. In respect to the Levittown tapes and the El Cortijo order, the Government, citing *United States v. Principie*, 531 F.2d 1132 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977), argues that the El Cortijo order was an extension of the Levittown order. It was, the Government points out, part of the same general investigation, conducted for the same purpose, related to the same crime or crimes, and it involved the same mechanisms of interception. Since the orders related to successive premises occupied by the same person, Ojeda, the Government argues that the El Cortijo order was a simple extension of the Levittown order and that continuity was not destroyed by Ojeda's residential move. Any other ruling, we are told, would thwart legitimate governmental investigatory efforts every time a suspect changed his residence. As a last resort, the Government argues that its mistake was an honest one and that it was therefore acting in good faith. In other words, the Government would have us liberally construe extension orders, that is to say, take "a flexible approach." The Government also criticizes the weight attached by the district court to the differences between the Levittown surveillance and the El Cortijo surveillance. The former involved a microphone in the apartment and taps on three public telephones; the latter was a tap on a private telephone. The Government points out that the El Cortijo order also authorized the placement of a microphone in the El Cortijo apartment, but the investigators never had an opportunity surreptitiously to install it.

We said in *Vazquez, supra*, that the term "extensions" is "to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however, designated, where the surveillance involves the

same telephone, the *same premises,* the same crimes, and substantially the same persons." 605 F.2d at 1278 (emphasis added) (citing *United States v. Scafidi,* 564 F.2d 633, 641 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978), and inviting comparison to *Principie, supra,* 531 F.2d at 1142 n.14). The Government argues that our reference in *Vazquez* to the "same premises" is dictum, because the interception in *Vazquez* did not involve a change in location. This is true, but we see no reason to depart from *Vazquez*'s statement since it represents the common sense of the matter.

The Government relies principally on the *Principie* case, for the proposition that when a target of surveillance moves to evade detection, an order for the second location is an extension of the order for the first location. *Principie* was an opinion authored by one member of this panel and concurred in by another. We note that it had nothing to do with the statutory provision at issue here. In *Principie*, we were concerned only with the requirement of providing notice to persons overheard during surveillance, under 18 U.S.C. § 2518(8)(d). *Principie*, 531 F.2d at 1142. The requirement of giving inventory notice, unlike the sealing requirement, does not go to the underlying integrity of the tapes. Moreover, the facts in *Principie* differed significantly from the present case. In *Principie*, an electronic surveillance order for a club was issued and extended in July. The targets moved their headquarters on September 1, but an additional extension order covering the original location was issued on September 11. *Id.* at 1135-36. The September 11 order was then "renewed and amended" on September 27 to cover the new location. *Id.* at 1142 & n.14. *Principie* is thus distinguishable; there was a continuity between the orders in that case that is lacking in ours. We conclude that the location of a wiretap or

other electronic surveillance is not an optional factor to be discarded on a "flexible" basis when the targets and crimes are similar or the same.

In so saying, we recognize and are impressed, if not entirely pressed to our conclusion, by the fact that a 1986 amendment to Title III permits roving surveillance of a named target in specified circumstances, although this provision was not in effect when the interceptions at issue here occurred. *See* Electronic Communications Privacy Act of 1986, § 106(d)(3), Pub. L. No. 99-508, 100 Stat. 1848, 1857 (codified at 18 U.S.C. § 2518(11) (Supp. V 1987)). The Government finds the legislative history of section 2518(11) "instructive" in that it contemplates the roving surveillance of suspects who move from room to room in a hotel or of alleged terrorists who use different telephone booths to avoid surveillance. *See* S. Rep. No. 541, 99th Cong., 2d Sess. 32, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3555, 3586. It may be that the new section 2518(11) would have authorized roving surveillance of Ojeda, who seems to have suspected that he was under surveillance. The fact remains that section 2518(11) was added after the surveillance of Ojeda; we find the *absence* of this provision in 1984 instructive.

Thus we hold that the El Cortijo order was not an extension of the Levittown order and that the Levittown tapes must stand or fall on their own. It was therefore necessary for the Government to justify the delay of up to eighty-two or ninety-six days, whichever is considered the period of time. The district court's reference to suppression "on the basis of time alone" implies that there could be no "satisfactory explanation," in the language of the statute, for such a long sealing delay. This presumption would, however, extend our cases, particularly *United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976), too far. Never-

theless, we do not think that the Government's explanation here was satisfactory. The supervising attorney mistakenly thought that the Government was not obligated to seal any electronic surveillance evidence in the case until there was a "hiatus" in the investigation as a whole. On appeal, the Government objects to an automatic rule of exclusion based on the length of the sealing delay. It argues that, as under *Mora's* analysis, the integrity of the tapes, prejudice to the defendants, benefit to the Government, the cause of the delay, and the length of the delay should all be weighed to determine the adequacy of the explanation. *See Mora,* 821 F.2d at 867-69. The Government asserts that this analysis should have led to the admission of the Levittown tapes, just as the latter El Cortijo and Taft Street tapes were admitted.

We agree that the factors enumerated in *Mora* should be considered. However, our weighing of those factors leads us to sustain the suppression of the Levittown tapes. In discussing sealing delays, the First Circuit observed that "[a]n explanation is unlikely to be deemed satisfactory if it is reflective of gross dereliction of duty or wilful disregard for the sensitive nature of the activities undertaken by means of the order." *Id.* at 869. We think that unfortunately the failure to seal the Levittown tapes here resulted from a disregard of the sensitive nature of the activities undertaken. The danger here is, of course, that today's dereliction becomes tomorrow's conscious avoidance of the requirements of law. The privacy and other interests affected by the electronic surveillance statutes are sufficiently important, we believe, to hold the Government to a reasonably high standard of at least acquaintance with the requirements of law. We therefore agree with the First Circuit that when sealing is other than immediate, the resultant evidence can be utilized "if—and only if—a 'satisfactory explanation' for the delay eventuates," *id.* at 867, and we hold that the Government's burden here was not met by proof that the tapes were free from adulteration. While the Government's misunderstanding of the law might help to excuse the nineteen-day delay accepted by Judge Clarie in respect to the later El Cortijo tapes, we think that the eighty-two or ninety-six day delay in respect to the Levittown tapes was not satisfactorily explained thereby. *See id.* at 868 ("the lengthier the delay, the more difficult to find the government's explanation 'satisfactory' "). Thus we affirm Judge Clarie's order suppressing the Levittown tapes.

As to the Vega Baja tapes, there was a twelve-day hiatus from the expiration of the January 18 order on February 17, 1985, to the issuance of an extension on March 1. Here the Government's explanation covers only a twelve-day period, which is on the borderline of acceptability. *See United States v. Massino,* 784 F.2d 153, 158 (2d Cir. 1986) (fifteen-day delay "among the longest we have been willing to tolerate"). The Government reminds us that there has been no showing of bad faith on its part. We do not agree with the Government that its good faith, by analogy to the analysis of the exclusionary rule in *United States v. Leon*, 468 U.S. 897 (1984), justifies admission of any tapes that are free from tampering. We think that importing Fourth Amendment analysis (which concededly might be justifed in the case of section 2518(10(a)) into the construction of the independent suppression remedy in section 2518(8)(a) would be unsound, because it would fail to recognize the explicitly stated congressional purposes of subsection (8)(a). *See Mora,* 821 F.2d at 866-67. In other words, the cause and length of the delay, the deliberateness of the statutory transgression, the integrity of the tapes, the tactical advantages or disadvantages accruing from the error,

and other relevant factors in a given case must all be considered in answering the sole question which the statute requires to be asked, namely, whether there is "a satisfactory explanation for the absence" of timely judicial sealing. *See id.* at 867 (quoting 18 U.S.C. § 2518(8)(a)).

The issue with respect to the Vega Baja telephone tapes then is whether the Government satisfactorily explained the twelve-day lapse from the expiration of the January 18 order, on February 17, to the issuance of an "extension" on March 1. The Government claimed that it needed that time to revise the affidavits that it submitted to obtain the surveillance order. However, the district court found that the March 1 affidavit did not differ significantly from the earlier ones; indeed, the March 1 affidavit was textually similar and in fact shorter than that supporting the January 18 order. It was only on March 31 that the Government submitted its substantially revised affidavits, some 166 pages in length. The court decided that the Government should have completed the task more expeditiously, and the court held that the March 1 order could not be deemed an extension of the January 18 order. We agree with this conclusion and hence with the court's calculation that there was a 118-day delay in sealing these tapes. Again, while we eschew any thought of automatic suppression on the basis of time alone, we do not believe that any "satisfactory explanation" has been offered for this long delay other than an underlying cavalier conception that the sealing requirements are technical, rather than reflective of congressional concerns about underlying constitutional requirements. We therefore affirm the district court's suppression of the Vega Baja telephone tapes.

Judgment affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Crim. No. H-85-50

UNITED STATES OF AMERICA

v.

VICTOR MANUEL GERENA, ET AL

RULING ON THE GOVERNMENT'S MOTION FOR CLARIFICATION AND RECONSIDERATION OF THIS COURT'S RULING ON THE DEFENDANTS' MOTION TO SUPPRESS TAPE RECORDED EVIDENCE FOR VIOLATION OF 18 U.S.C. SEC. 2518(8)(a)

[Filed Aug. 2, 1988]

On July 7, 1988, this Court issued a "Ruling on the Defendants' Motion to Suppress Tape Recorded Evidence for Violation of 18 U.S.C. Sec. 2518(8)(a)." (hereinafter referred to as the ruling). On July 20, 1988, the government filed a motion seeking clarification and reconsideration of footnote three (3) and footnote ten (10) of the ruling. In addition, on August 2, 1988, the government sought, and this Court granted, a request to amend the July 20, 1988 reconsideration motion. The government's amended request sought that the Court reconsider its ultimate decision in the ruling which ordered the suppression of tape recorded conversations intercepted at Levittown, Puerto Rico and the January 18, 1985 Vega Baja telephone tapes.

The government's Amended Motion for Clarification and Reconsideration, dated August 2, 1988, is denied. The

Court abides by its ruling which ordered the suppression of the Levittown tapes and the tapes intercepted pursuant to the January 18, 1985 Vega Baja telephone order. The Court also denies the government's motion for reconsideration of footnote three (3) of the ruling.

As a result of an editorial error, however, the Court clarifies footnote ten (10). Footnote ten (10) is modified to read: "The Levittown and January 18, 1985 Vega Baja telephone interceptions, although untimely sealed, can still be used for impeachment purposes. *See United States v. Winter*, 663 F.2d 1120, 1154 (1st Cir. 1981), *citing, United States v. Haven*, 446 U.S. 620 (1980)."

SO ORDERED.

Dated at Hartford, Connecticut, this 2nd day of August, 1988.

/s/ T. Emmett Clarie
T. EMMET CLARIE
Senior District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Crim. No. H-85-50

UNITED STATES OF AMERICA

v.

VICTOR MANUEL GERENA, ET AL

RULING ON THE DEFENDANTS' MOTION TO SUPPRESS TAPE RECORDED EVIDENCE FOR VIOLATION OF 18 U.S.C. SEC. 2518(8)(a)

[Filed July 7, 1988]

The defendants have moved to suppress the 1,011 sealed electronic surveillance tapes which are in Spanish and made in Puerto Rico pursuant to orders issued and supervised by Chief Judge Perez-Gimenez during the period of April 27, 1984 through August 23, 1985. The defendants' motion to suppress is based on the alleged failure of the government to seal the tapes in a timely manner. The Court has heard testimony from twenty F.B.I. monitoring agents, F.B.I. agents involved in presenting the tapes for judicial sealing, the electronic surveillance clerk who maintained custody of the tapes after interception, attorneys within the Department of Justice who supervised the Title III investigation, as well as defense and government experts in the field of tape authenticity. Both the defendants and the government have filed lengthy,

comprehensive briefs on the issue of sealing. Based on all the information, the motion to suppress the tapes is granted in part and denied in part. The Court suppresses, on the basis of time alone, all Levittown tapes and those Vega Baja telephone tapes made pursuant to the January 18, 1985 order; the motion to suppress all other tapes is denied. The basis for the Court's ruling is set forth below.

FACTS

The defendants in this case have moved the Court to suppress the one thousand and eleven (1,011) electronic surveillance tapes generated in Puerto Rico in connection with the F.B.I.'s investigation of an alleged terrorist group which calls itself Los Macheteros.[1] The investigation commenced as the result of a Light Anti-Tank Weapon (LAW) Rocket Attack on the F.B.I. Office in the Federal Building in Hato Rey, Puerto Rico on October 30, 1983.

In connection with this case, the F.B.I. commenced electronic surveillance on April 27, 1984 and continued that surveillance at various locations until August 30, 1985. Two attorneys within the Department of Justice, Trial Attorney Frank Bove and Assistant United States Attorney Roberto Moreno acted as Title III supervising attorneys. The Chief Judge of the Federal Court for the Commonwealth of Puerto Rico, Judge Perez-Gimenez,

[1] In the course of the electronic surveillance in Puerto Rico, the government generated 1,011 tape recordings. The government has reserved the right to introduced 166 recordings in its case-in-chief. The 166 so-called relevant tape recordings are from the surveillance at the following locations: Datsun Sentra, Levittown, Taft Street, El Cortijo, Vega Baja, and the El Centro condomium. Although the government also had authorization to conduct surveillance at the following locations: Paseo Arce residence, a farmhouse in Vega Baja, a 1980 Jeep Cherokee, a 1982 Jeep Suzuki, and a 1980 Datsun Hatchback, surveillance devices were never installed.

was the authorizing judge for all the electronic surveillance that was conducted in Puerto Rico. In addition, Judge Perez-Gimenez reviewed all Title III progress reports submitted and sealed all tapes generated in the course of the investigation. Sixty-four Spanish speaking agents, from various parts of the United States, were temporarily assigned to Puerto Rico as electronic surveillance monitors during this period.

During the course of this electronic surveillance, the F.B.I. uncovered evidence which implicated Los Macheteros in the $7.2 million robbery of a Wells Fargo Depot in West Hartford, Connecticut on September 12, 1983. Pursuant to an indictment handed down by a Hartford Grand Jury in connection with the $7.2 million dollar robbery, eleven defendants were arrested in Puerto Rico on August 30, 1985. The electronic surveillance terminated on August 30, 1985 as a result of the arrests and attendant searches. Also on August 30, 1985, one defendant was arrested in Dallas, Texas and other defendant arrested in Cuernavaca, Mexico by Mexican authorities. Based on a superseding indictment handed down by a New Haven Grand Jury, three additional defendants were arrested on March 21, 1986.

The first electronic surveillance order, an April 27, 1984 order, authorized the F.B.I. to intercept conversations at the Second Floor Apartment #3384, Levittown Boulevard, Levittown Puerto Rico and at three pay telephones [(809) 795-9908, 795-9909, 784-9625] across from the Levittown apartment. Pen registers were also employed in the course of monitoring the public telephones. The Levittown apartment was identified in the affidavit filed by Special Agent Jose Rodriquez, in support of the order, as the apartment of the defendant, Filiberto Ojeda-Rios. The F.B.I. was authorized to intercept conversations which concerned

violations of Section 2384 (seditious conspiracy), 1951 (interference with commerce by threats or violence), 844(f) and (i) (destruction of government property and malicious destruction of property used in interstate or foreign commerce), and 371 (conspiracy to commit an offense or defraud the United States) of Title 18, United States Code.[2] The government sought and received two extensions to intercept conversations at the Levittown apartment and the three pay telephones. The final order expired on July 23, 1984. In fact, however, the F.B.I. ceased monitoring on July 9, 1984.

On May 11, 1984, the government sought and received authorization to intercept conversations from a 1982 Datsun Sentra Stationwagon, Puerto Rico License No. 20B892, registered in the name of Jose Rodriguez Perez, an alias for the defendant, Filiberto Ojeda-Rios. The F.B.I. sought and received four extensions to intercept conversations in the Datsun Sentra.

On July 27, 1984, the government sought and received authorization to intercept oral communications by microphone at the Taft Street apartment in Santurce, Puerto Rico and wire communications at the Taft Street residence telephone (809) 725-1629. In addition, the government sought and received authorization to intercept wire and oral communications at Calle 2, #B-2, El Cortijo, Bayamon, Puerto Rico, (809) 799-4524. Pen registers were employed at both locations in connection with the telephone interception. The Taft Street apartment was the residence of two defendants in this case, Juan Segarra-Palmer and Luz Berrios-Berrios. At this point in the investigation, El Cortijo was the residence of the defendants, Filiberto Ojeda-Rios and Luis Colon-Osorio. One

[2] The F.B.I. was authorized at all locations to intercept conversations which concerned these crimes.

extension was sought and granted for continued oral surveillance at El Cortijo and Taft Street as well as wire surveillance at El Cortijo. No extension was sought to continue wire surveillance of the Taft Street residence telephone. The equipment to intercept oral communications was never installed at either El Cortijo or Taft Street because the F.B.I. could not gain entry to the residences despite continued efforts.

On November 1, 1984, Judge Perez-Gimenez authorized the F.B.I. to intercept oral communications at Calle 14, Vega Baja, Puerto Rico, the changed residence of the defendants Segarra-Palmer and Berrios-Berrios. Six extensions were authorized at the Vega Baja residence. On January 18, 1985, the F.B.I. received authorization to intercept wire communications at two public telephones near the Vega Baja residence [(809) 855-9943, 858-9639]. Pen registers were used in the course of the Vega Baja telephone surveillance. A new order was authorized on March 1, 1985 and two extensions to continue the wire surveillance were thereafter granted. The final extensions for both the residence and the pay telephones expired on May 30, 1985.

The last electronic surveillance order authorized the F.B.I. to intercept oral communications at the El Centro Condominium, Building One, Suite 249, Hato Rey, Puerto Rico. The initial thirty day order expired on July 26, 1985 and two extensions were thereafter issued. Although the final extension expired on September 22, 1985, in fact, the wiretap terminated on August 30, 1985 "due to the execution of a search warrant on the location." (El Centro progress report ten (10), Dated September 4, 1985).

The F.B.I. used Revox A700 and B77 reel-to-reel tape recorders at the various monitoring sites. One recorder was designated an original recorder and one recorder a duplicate original. The machines were set up so that signal

was sent independently into each recorder and two simultaneous recordings were produced. One recording was designated the original and the other recording the duplicate original. Where conversations were being monitored and it appeared that the reel-to-reel tapes were about to run out, the agents were instructed, fifteen minutes before the tapes ran out, to fast forward the duplicate original reel, remove it from the recorder, and place a new tape on the duplicate original machine. This new tape would be deemed an original tape. Several minutes prior to the first tape running out, the agents were to begin recording on the continuation original tape. This would result in duplicative recordings for several minutes. (*See* written memorandum from Special Agent Calvin Sieg, G.X. #375A).

However, this so-called Sieg procedure was orally modified and a simpler method was adopted over time to record conversations during the change of tapes. Sony superscope cassette recorders were used to record conversations sought to be intercepted during the change of the reel-to-reel tapes. The cassettes so generated are titled "A" Tapes. Fifty-five "A" Tapes were produced at Levittown.

Cassette recorders were used for two additional purposes during the Title III investigation. The Datsun Sentra surveillance was carried out using the Sony superscope cassette recorders. In addition, the F.B.I. monitors testified that cassette recorders were employed at the locations by many monitors to create a simultaneous cassette recording with the reel-to-reels. This simultaneous cassette recording was used as a work cassette at the monitoring site to assist agents in maintaining accurate Title III logs of the conversations being intercepted. The use of cassette recorders to make work cassettes in Puerto Rico was first disclosed to both the Court and the defendants on September 1, 1987. Some work cassettes were retained by

the F.B.I. and have been disclosed to the defendants. Other work cassettes were either reused by monitors or taken to the F.B.I. office and run through a bulk eraser. The defendants claim that the use of work cassettes, specifically, the failure to present the work cassettes for judicial sealing as original tapes, violated Title III. The Court rejects this argument. The tapes that concern the Court in regard to the Title III sealing requirement are those tapes designated in the course of the surveillance as original reel-to-reel tapes. The original reel-to-reel tapes are the evidence in this case.

In addition, the defendants have alleged other Title III violations, including allegations that the monitoring agents listened without recording. In regard to both the work cassette and listening without recording claims, the defendants have attacked the credibility of the monitoring agents. It is premature to address these allegations at this time; the claims are not relevant to the Court's determination of whether the government has violated 18 U.S.C. Sec. 2518(8)(a) and will be addressed in separate rulings.

The monitoring agents used chain of custody envelopes, FD 504 envelopes, for the original reel-to-reel tapes. The first monitor of the day would prepare the FD 504 with the case file number, reel number, court order number, location being monitored, and the monitoring agent's name. At the termination of a reel-to-reel, the monitoring agent on duty would place both the original tape and the overhear log, a written summary of the surveillance activities, into the FD 504 envelope. Either the monitoring agent or another special agent would deliver the FD 504 envelope to Roberto Salicrup, the electronic surveillance (ELSUR) clerk. If Salicrup was not available, the agent would drop the FD 504 envelope through a mail slot into the Electronic Surveillance Room (ELSUR room) in The F.B.I. Office in Hato Rey, Puerto Rico. The face of the

504 envelope would indicate the transfer from the various agents to either Salicrup or to the ELSUR room. Roberto Salicrup established a procedure to log in the original tapes received. After an original tape or an original cassette, in the case of the Datsun Sentra, was administratively processed by Salicrup, that tape was placed in a locked metal filing cabinet.

The F.B.I. monitoring agents delivered the duplicate original tapes to translators/transcribers in the Hato Rey F.B.I. Office. Copies of the original overhear logs were made prior to delivering the originals to the ELSUR room and copies of the overhear logs were also brought to the translators/transcribers. In the case of the Datsun Sentra cassettes, the monitoring agents made high speed copies of the original Datsun Sentra cassettes prior to delivering the originals to the ELSUR room. These high speed copies were brought to the translators/transcribers for review.

The government has represented that it seeks to introduce 166 tapes generated from the electronic surveillance conducted in Puerto Rico in its case-in-chief. The tapes were created at the following locations: Levittown, the Datsun Sentra, Taft Street, El Cortijo, Vega Baja, and El Centro. At three specific points in the investigation, the tapes were judicially sealed. Four hundred and fifty-seven tapes from Levittown, Datsun Sentra, Taft Street, and El Cortijo were sealed on October 13, 1984. The Vega Baja tapes, four-hundred and sixty-seven in number, were sealed on June 15, 1985, and the eighty-eight El Centro tapes were judicially sealed on September 14, 1985. The defendants have challenged the timeliness of all three sealings under Title III, 18 U.S.C. Sec. 2518(8)(a).

DISCUSSION OF LAW

I. *OVERVIEW*

Title 18 U.S.C. Sec. 2518(8)(a) requires that

> immediately upon the expiration of the period of the order [warrant] or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. The presence of the seal provided for by this subsection or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

The statute is clear in requiring timely sealing as a prerequisite for the use or disclosure of the wire or oral communications intercepted. "A violation of the (post-interception) sealing requirement is to be controlled by the exclusionary command of the same statute which imposed the requirement in the first place." *United States v. Mora,* 821 F.2d 860, 866 (1st Cir. 1987). Thus, the exclusionary provisions under Secs. 2515 and 2518(10)(a) do not control in this area. *Accord United States v. Diana,* 605 F.2d 1307, 1312 (4th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980).

This ruling focuses on that portion of the statute which, in essence, requires immediate sealing of the tapes, as a prerequisite for their use, upon the expiration of an order or extension thereof. "The legislative history to 18 U.S.C. Sec. 2518(8)(a) reveals that the sealing requirement contained therein was intended to insure the integrity of tapes after interception." Delay in Sealing or Failure to Seal Tape or Wire Recording as Required by 18 U.S.C. Sec. 2518(8)(a) as Ground for Suppression of Such Recorded Evidence At Trial," 62 A.L.R. Fed. 636, 639 (1983).

Several circuits have described the aim of the statute. "The post interception procedural requirements contained in 18 U.S.C. Sec. 2518(8)(a) aim to preserve the integrity of the intercepted conversations to prevent any tampering or editing of the tape or unlawful use." *Mora*, 821 F.2d at 867. *See United States v. Gigante*, 538 F.2d 502, 506 (2d Cir. 1976); *United States v. Mendoza*, 574 F.2d 1373 (5th Cir. 1973), *cert. denied*, 439 U.S. 988 (1978); *United States v. Lawson*, 545 F.2d 557 (7th Cir. 1975).

The Court notes that despite the stated objectives, the statute does not require immediate sealing of recordings at the expiration of each thirty day order. For example, if the government sought and received continuous authority, by an initial order and subsequent extensions, to conduct electronic surveillance at the same location for a one year period, the sealing requirement would be triggered only at the expiration of the final thirty day period. Thus, the government would not be required to seal tapes generated pursuant to the initial order until twelve months later. *See United States v. Fury*, 554 F.2d 522, 533 (2d Cir. 1977), *cert. denied*, 436 U.S. 931 (1978) (there is some logic in the proposition that the purpose of the sealing requirement would be better served if the tapes were sealed every thirty days).

As a general rule, most circuits have held that the failure to adhere strictly to the immediacy requirement is not *ip so facto* grounds for suppression of all types derived from the electronic surveillance. Rather, courts have established a somewhat more flexible approach to the issue. As in the case of an absence of any sealing, a delayed sealing will prompt a court to ask for a satisfactory explanation. Various circuits have, however, taken a slightly different approach in their analysis of what constitutes a satisfactory explanation. For example, the seventh circuit set forth a standard in *United States v. Angelini*, 565 F.2d 469

(7th Cir. 1975), *cert. denied*, 435 U.S. 923 (1978). The seventh circuit looks initially to whether a satisfactory explanation for the delay exists. If an explanation is satisfactory, the tapes need not be suppressed. However, even if the court is not satisfied with the explanation, the tapes need not be suppressed provided that the purposes intended by Congress were fulfilled despite the delay.

In *United States v. Massino*, 784 F.2d 153 (2d Cir. 1987), the second circuit set forth a very explicit schedule which is to govern the sealing of tapes gathered through electronic interception. The schedule enunciated in *Massino*, however, applies to future cases and does not govern the electronic surveillance conducted in connection with this case. Thus, at the time that the electronic interceptions occurred in Puerto Rico in this case, the second circuit was not operating under the schedule set forth in *Massino*. Rather, at the time of this investigation, the second circuit followed a procedure set forth in *United States v. Rodriquez*, 786 F.2d 472 (2d Cir. 1986). Pursuant to *Rodriquez*, the court inquires as to whether a satisfactory explanation for the sealing delay has been proffered by the government. The determination of whether or not the government has offered a satisfactory explanation turns on several factors, including whether the tapes have been tampered with, whether the defendants have been prejudiced by the delay, the length of the delay, the diligence of law enforcement personnel in performing the necessary pre-presentment tasks, the foreseeability and urgency of circumstances diverting the attention and energies of those responsible for the presentation of the tapes to other matters, the amount of time needed to prepare the tapes for sealing, and whether there is any evidence of bad faith on the part of law enforcement agencies to evade the statutory sealing requirements. *Rodriquez*, 786 F.2d at 476.

The first circuit in *Mora*, 821 F.2d at 867-869, set forth the standard it applies when faced with the issue of the government's failure to seal electronic surveillance tapes in a timely fashion. A court is directed under *Mora* to ask one question, "Is there a satisfactory explanation for the absence of timely judicial sealing?" Factors which are critical to the court's resolution are: 1) whether the government has proven by clear and convincing evidence that the integrity of the tapes has not been compromised, 2) whether the delay in presenting evidence for sealing came about in good faith, 3) what is the length of any particular delay, and 4) what is the cause of the delay.

This Court ruled on February 4, 1987 that the law of the first circuit controlled where a material difference exists between the sealing requirements in the first and second circuits. The February 4, 1987 ruling was based on the fact that all the electronic surveillance which is the subject of the present motion to suppress was conducted pursuant to orders issued within the first circuit jurisdiction, and Title III relies heavily on local judicial supervision. Thus, where conflicts arise between the law of the circuit where the orders were issued and that where the motion to suppress is pending, the former prevails. As noted above, there is no material conflict between the law of the first circuit as expressed in *Mora* and that of the second circuit, at the time the tapes in this investigation were sealed, as expressed in *Rodriquez*. In both cases, where the tapes were not sealed in a timely manner, the burden rests on the government to provide a satisfactory explanation for the delay. In both circuits, whether an explanation is deemed satisfactory turns on a variety of factors. Thus, the Court's findings in regard to the issue of timely sealing under the law of either circuit are the same.

The government intends to introduce surveillance tapes derived from electronic surveillance conducted at the fol-

lowing locations in Puerto Rico: Levittown Boulevard, Datsun Sentra, Taft Street, El Cortijo, Vega Baja, and the El Centro Condominium. In regard to all sealing dates except the Datsun Sentra, the Court has found that the tapes were not sealed "immediately" as the term has been defined. (see Appendix A) The parties disagree not only about whether the delays incurred were justified but also about how the delays are to be calculated. In the brief filed on June 13, 1988, the defendants miscalculated the thirty day period of an order as well as the actual sealing delays in this case. In computing the thirty day period, the day of authorization is not included. Thus, a thirty day order granted on June 23 expires on July 23. Secondly, as with a thirty day order, in calculating the length of a sealing delay, the date on which the authorization ends is not included. Thus, a delay of sixteen days is found where an order terminates on May 30 and the tapes are not sealed until June 15. *United States v. Badalamanti*, 794 F.2d 821 (2d Cir. 1986); *United States v. Rodriquez*, 612 F.Supp. 718, 726 (D.C. Conn. 1985). The actual delays encountered in this case will be discussed below in greater detail. Initially, however, in light of the Court's finding that the government failed to comply with the immediacy requirement, the government has the burden to show by clear and convincing evidence that the tapes intended to be used by the government in its case-in-chief have not been altered.

II. INTEGRITY OF THE TAPES

Introduction:

In *Mora*, the first circuit stated that it would look "first—and most searchingly—at whether the government has established . . . that the integrity of the tapes has not been compromised." *Mora*, 821 F.2d at 867. Late-sealed tapes must be excluded at trial unless the court finds that

the government has proven the integrity of the subject tapes[3] by clear and convincing evidence. *Id.*

In line with the decision in *Mora*, the District of Columbia Circuit has "reject[ed] . . . [the] suggestion that it is incumbent upon the potentially aggrieved person to present evidence constituting a colorable challenge to the integrity of the tapes." *United States v. Johnson*, 696 F.2d 115, 124-125 (D.C. Cir. 1982); *see also Gigante*, 538 F.2d at 507. Accordingly, it is not the defendants' obligation "to prove affirmatively that tampering has occurred;" rather, the government must establish by clear and convincing proof that the subject tapes are "pristine." *Mora*, 821 F.2d at 868.

In *Mora*, *Johnson* and other late-sealing cases, in evaluating the integrity of late-sealed tapes, the courts divided their attention between (1) the chain of custody of the tapes; and (2) the physical integrity of the tapes. Accordingly, the Court's analysis of the integrity of the tapes is likewise bifurcated.

A. *Chain of Custody*

Written procedures for handling of the Title III evidence were contained in the F.B.I.'s "MIOG" (Manual of Investigative Operations and Guidelines); in a memorandum by Special Agent Calvin Sieg ("Sieg memorandum")' and in the ELSUR (i.e. electronic surveillance) working guide. In addition to the written instructions, the monitoring agents were also given oral in-

[3] Because the Court has determined that the Datsun Sentra tapes were judicially sealed in a timely fashion and because the Court has suppressed the Levittown residence and payphone tapes due to the excessive delay in sealing, these tapes are not considered in the instant analysis of the integrity of the tapes. Moreover, the Court's review shall be limited to the evidence tapes, those tapes which the government has designated for possible use in its case-in-chief.

structions as to the handling of Title III evidence in this case.

Chain of custody documentation was initiated at the beginning of each monitoring shift. At the start of the shift the agents filled out a F.B.I. form FD-504 envelope listing their name, the date and the time. On the leader of the tape itself, the agents wrote down the location, reel number, date, time and their initials. At the end of a shift or a reel, the monitoring agents rewound the tape, returned it to the original box and placed it inside the F.B.I. form FD 504 envelope, together with the written monitoring log. When a tape was completed in the middle of a shift, a new FD-504 envelope was started for the next tape.

As a general practice, the monitoring agents on a shift delivered the completed tapes to the F.B.I. office in Hato Rey, Puerto Rico and deposited the envelope through a mail slot into a locked, restricted access room (i.e. the ELSUR room). If a tape was still on the machine at the end of a shift, the monitoring agent signed the FD-504, releasing custody to the next shift monitor, who then signed the FD-504, accepting custody. Agents monitoring on the evening shift removed the tapes and delivered them to the ELSUR room at the end of their shift, usually around 11 p.m. However, because of the distance from the monitoring site to the F.B.I. office, second shift agents at the Levittown and Veja Baja monitoring sites left their tapes at the monitoring site in the custody of the security agent, a special agent of the F.B.I. whose duty it was to maintain the security of the monitoring post, the surveillance equipment and the tapes. In most instances, the security agents delivered those tapes to the ELSUR room the next morning.

Roberto Salicrup ("Salicrup") was employed by the F.B.I. as the electronic surveillance file assistant ("ELSUR clerk") in Hato Rey, Puerto Rico during the period of

April 1984 through September 1985. He took three training courses in connection with his duties as an ELSUR clerk. As the ELSUR clerk, Salicrup had responsibility for maintaining custody of the electronic surveillance tapes and controlling access to the evidence room.

Roberto Salicrup maintained a controlled access room for the storage of electronic surveillance tapes in the F.B.I. office at Hato Rey, Puerto Rico. Entry to the ELSUR room was gained through a single door which was kept locked at all times. During the course of this investigation, a second ELSUR room was created and designated as Room No. 2, adjacent to the first room, but not accessible through a connecting door. The door to each ELSUR room had two locks. One locking mechanism was common to both doors, but the second lock on each door was different. When Salicrup was outside either ELSUR room, the doors always remained locked. Only five other people, Special Agent David Shrimp, Luis Berrios and Rita Olivo, as well as the Special Agent in Charge and the Assistant Special Agent in Charge, had access to the ELSUR room. Only Roberto Salicrup maintained a set of keys to the rooms. The second set of keys are kept in a safe in the office of the Special Agent in Charge. Individuals who entered and left the ELSUR room were required to sign the ELSUR log and state the reason why they were entering, the date and time they entered and the date and time that they left.

On a typical morning, it was Roberto Salicrup's responsibility to sign the entry log to the ELSUR room, to check and see if any tapes had been deposited through the mail slot on the door and to take custody of any such tapes. He assumed custody by signing his name on the FD-504 envelope. Salicrup then opened the FD-504 envelope to ensure that the tape was inside and properly labelled. Salicrup checked the FD-504 envelope to be certain that it

had been properly completed and he compared the label on the box to the label on the reel to make sure that they corresponded. He also checked the leader of the tape to determine whether there were any discrepancies. Once he had confirmed that all markings were correct, Salicrup sealed the FD-504 envelope with evidence tape and placed it in a special metal filing cabinet which was kepted locked at all times with a bar-lock security device. Salicrup possessed the only key to this device.

If there were any discrepancies between a FD-504 envelope and the tape, or on the FD-504 envelope, Salicrup went to the agent responsible for the apparent irregularity to resolve any questions. It was Salicrup's duty to locate such agents, many of whom were regularly monitoring at off-site locations. Accordingly, Salicrup was unable to seal every tape the same day that he received it. Corrections were made to some FD-504 envelopes. There are no records of which FD-504 envelopes were corrected.

Salicrup had responsibilities outside of the ELSUR room and, therefore, he did not remain constantly in the ELSUR room while on duty. While outside of the ELSUR room, Salicrup had the equipment (i.e. block stamp and evidence sealing tape) and the opportunity to accept tapes from monitoring agents. In such instances, Salicrup would verify the information on the FD-504 envelope and tapes and would block stamp and seal these tapes and their accompanying documentation and deposit them through the slot in the ELSUR door.

When Salicrup discussed questions about tapes with an agent, he never left the tape with the agent. The tape remained in Salicrup's custody. Whenever Salicrup released custody of a tape he would ensure that the person accepting custody of the tape signed the FD-504 envelope to reflect that fact. It was around July 1, 1985, with the

publication of the "ELSUR Working Guide", that Salicrup began making a notation on the FD-504 envelope of the purpose for which custody of a specific tape was transferred. Commencing at that same time, and in compliance with the newly received procedures in the ELSUR working guide, notation was made on the FD-504 chain-of-custody envelope of when, and for what purpose, the ELSUR clerk had occasion to access a tape held in the ELSUR safe. Salicrup never released custody of a tape that had been judicially sealed. It was Salicrup's practice to seal FD-504 envelopes with evidence tape and to initial and date that evidence tape. He would then complete an FD-192 form and staple it to the FD-504 envelope and take the entire package to a supervisor, who would initial the block stamp in the lower right hand corner of the FD-504 envelope and 192 form.

It was Salicrup's practice not to accept a tape more than five days after the date of interception, unless the agent delivering the tape had a written explanation for the delay. Such an explanation would also have to be given to the agent's supervisor and the supervisor would have to initial the agent's memorandum regarding the delay.

The date block-stamped on the documents reflects the date when Salicrup started processing the FD-504 envelope and 192 form. The dates on the 192 form and the FD-504 envelope, where Salicrup accepted custody, were not always the same because in some instances he prepared the 192 on the next day after he accepted custody. The date on the block stamp on the 192 form is the date that Salicrup prepared the 192 form. The typewritten material on the 192 form was pre-typed. The handwritten material on the form was entered on the date reflected in the block stamp. In a few instances, facial discrepancies exist between the dates on the FD-504 envelopes and the dates on the block stamp because Salicrup forgot to advance the date on the

block stamp machine on a Monday, after the weekend. As a result, the block stamp would inaccurately reflect the date of the preceding Friday.

On a few occasions, Salicrup observed that some of the FD-504 envelopes were torn when placed through the mail slot in the door of the ELSUR room. "A couple of times", envelopes were baldy torn, necessitating the re-making of the badly torn envelope. If there was only a small tear in the FD-504 envelope, Salicrup placed evidence tape over the tear and initialled it.

Salicrup never opened a judicially sealed box, except under the supervision of Chief Judge Juan Perez Gimenez. He never released custody of a judicially sealed tape. If a special agent wanted to remove a tape from the ELSUR room prior to judicial sealing, Salicrup required the agent to produce authorization from the supervisor. Furthermore, the ELSUR log often contained notations regarding the movement of tapes, such as when they were taken from the ELSUR room to be copied. If a FD-504 envelope was opened after it had been sealed by Salicrup, such fact would be reflected upon the face of the FD-504 envelope, as there would be a second opening sealed by evidence tape, dated and initialled by Salicrup.

The agent delivering the FD-504 envelope made a photocopy of the monitoring log before turning in the original tape to the ELSUR clerk. The duplicate original reels were taken to the NAVMUR/NAGBOM room where the F.B.I. translators and transcribers worked. In the case of cassette tapes, the delivering agent made a high-speed copy before the original cassette was turned-in to the ELSUR room.

ELSUR clerk Salicrup participated in the judicial sealing by Chief Judge Juan Perez Gimenez of all the electronic surveillance tapes recorded in Puerto Rico in this case. Salicrup placed evidence tape on the banker's boxes

housing the tapes and Chief Judge Perez Gimenez placed his initials and the date on the boxes which he sealed. Special Agents James Millen and Arthur Balizan travelled to San Juan, Puerto Rico and brought the sealed original tapes, secured in the banker's boxes, and which in turn were secured in wooden crates, to the United States District Court in Hartford, Connecticut, in whose secured custody the tapes have continuously remained.

When the crates, the bankers' boxes and the 504 envelopes were inspected and unsealed in open court, all seals were found to be intact.

Defendants' Particularized Claims:

In their Post-Hearing Memorandum of Law and Proposed Findings of Fact, submitted in support of their motion to suppress electronic surveillance tapes, the defendants have set forth a litany of claims regarding the chain of custody of the tapes. The defendants assert that these claims demonstrate that the government has not discharged its burden of establishing the integrity of late sealed tapes. The Court has evaluated each of the defendants' chain of custody allegations in light of the applicable standards of law and all the evidence placed in the record during over six months of hearings on the instant motions. After careful review of all of the defendants' claims, the Court finds that they are without merit.

The defendants' individual claims are addressed specifically below:

1. **Failure of government agents to deposit Levittown and Veja Baja tapes in the custody of the ELSUR room or custodian on the date they were intercepted.**

The defendants asserted that because monitoring agents did not deliver many of the Levittown and Veja Baja tapes to the ELSUR room in the F.B.I. office in Hato Rey,

Puerto Rico, after the completion of the evening monitoring shift ending at 11 p.m., there is no way of knowing whether the tapes were kept at the monitoring site overnight or if they were taken elsewhere and tampered with.

The defendants' suspicions and idle speculation are unfounded. The FD-504 envelopes for the subject tapes clearly identify the agent who had custody of these tapes at all times prior to sealing. During the hearings on the instant motions, the defendants were afforded the opportunity to call and cross-examine those agents identified on the FD-504 envelopes as possessing the Vega Baja and Levittown tapes during the times in question. If, indeed, there was ever an occasion for tampering of the tapes, the defendants had ample opportunity to pursue this possibility in their examination of the custodial agents.

2. **No log for Vega Baja residence tape #130 was contained in the FD-504 envelope; no records were maintained by the F.B.I. documenting the custody of original logs; logs were removed from the ELSUR room in September, 1984 without explanation.**

The defendants assert that the above-stated allegations concerning the activity logs maintained by the monitoring agents somehow demonstrate deficiencies in the government's chain of custody of the tapes. Without first passing on the accuracy of these allegations, the Court emphasizes that its concern is with the chain of custody of the tapes, not the chain of custody of the logs. Second, the defendants are in error when they allege that the logs were taken from the ELSUR room in September, 1984. The evidence of record does not support such a claim.

3. **Agents made non-contemporaneous entries on the FD-504 envelopes.**

The defendants argue that ELSUR clerk Salicrup's practice of requesting monitoring agents to correct inaccu-

racies or fill-in portions left blank on the FD-504 envelopes constitutes "non-contemporaneous" entries which undermine the validity of these records. On the contrary, the Court finds that this practice served to heighten the reliability of these records rather than lessen it.

4. ELSUR clerk Robert Salicrup recreated FD-504 envelopes.

The defendants posit that such an act makes all FD-504 envelopes suspect. It was the testimony of ELSUR clerk Salicrup that FD-504 envelopes would, occasionally, become torn when passed through the mail slot into the ELSUR room. In such instances, Salicrup would patch the tear with evidence tape if the hole was not too large. He would copy-over all information from the torn FD-504 envelope if the tear was beyond repair. As all information from the original FD-504 would be duplicated onto the new form, the accuracy of the chain of custody document was not compromised.

5. Tape leaders from two Vega Baja payphones were missing starting times in 80-90% of the cases.

The defendants ascribe no particular prejudice to this minor lapse in record keeping, nor can the Court discern any.

6. ELSUR clerk Salicrup failed to initial and/or date the evidence tape seals in certain instances.

Likewise, no particular prejudice is attributed to these isolated occurences. The Court finds that these rare and innocuous lapses in record keeping practices do not undermine the integrity of the chain of custody.

7. Unexplained discrepancies between various chain of custody documents.

The defendants claim that in some instances logs were blockstamped before FD-504 envelopes were received;

that some evidence seals predate the receipt of the FD-504 envelopes by the ELSUR clerk; and that some FD-192 forms were block stamped several days after the date the FD-504 envelopes were received. The Court's examination of these claims reveals that they have no significance, but, to the extent that they are supported in fact, merely represent innocent instances of human error.

8. ELSUR clerk Salicrup backdated FD-192 forms.

The defendants allege that ELSUR clerk Salicrup deliberately and intentionally backdated FD-192 forms in an effort to fabricate a valid chain of custody. However, Salicrup's clear and unambiguous testimony does not permit so much as an inference that he intentionally backdated any chain of custody documents. Both his testimony and the evidence of record establish that any misdating of documents was a result of simple, innocent human error, such as Salicrup's failure to correctly set the date on the block stamp machine.

9. ELSUR clerk Salicrup received tapes when chain of custody documents show that he was not in the ELSUR room at the time.

The defendants claim that monitoring agents' entries on FD-504 envelopes reflect that they released custody of tapes to Salicrup at times when other records show that Salicrup was not in the ELSUR room. However, this claim ignores the simple fact that Salicrup did not remain constantly in the ELSUR room and that Salicrup had the equipment and the opportunity to accept tapes when he was out of the ELSUR room. On such occasions Salicrup would blockstamp the documents, seal the FD-504 envelope and stick it through the ELSUR slot.

Moreover, monitoring agents testified that they had a practice of filling-out the FD-504 envelopes, including the "released custody" section of the form prior to leaving the listening post and actually delivering the tapes. In such in-

stances, entries reflecting "released custody to ELSUR room" would result when these tapes were actually delivered to Salicrup when he was located outside of the ELSUR room.

10. Conflicts exist between entries on the FD-504 envelopes and the FD-192 forms regarding which agent released custody to the ELSUR room; conflicts exist between logs and FD-504 envelopes regarding who released custody of the tape to the ELSUR room.

The defendants assert that any such inconsistencies are evidence of falsification of the chain of custody. In making these claims, the defendants overlook the essential point which is that it is the FD-504 envelope which is the only true chain of custody document. Neither the FD-192 form nor the log have as their purpose the establishment of a chain of custody. Moreover, neither the FD-192 nor the logs are required to be created by those persons actually linked in the chain of custody. Accordingly, discrepancies between the chain of custody document, the FD-504 envelope (created by links in the chain of custody), and unrelated documents (created by others not necessarily in the chain), are of no significance.

12. Several tapes were not sealed by ELSUR clerk Salicrup within five days of interception; as a practice Salicrup took longer to seal "A" tapes.

The defendants allege that Salicrup did not comply with a F.B.I. internal policy requiring that evidence be secured within five days of receipt (See GX 391, p. 46). Examination of the instant claim reveals that it lacks merit for at least three reasons: (1) even if the internal policy of the F.B.I. required that electronic surveillance evidence be secured within five days, an internal policy of the F.B.I. does not carry the force and effect of law, and accordingly, the failure to adhere to such a requirement does not warrant sanction by the court. (*See United States v. Falcone,* 364 F. Supp. 877, 894 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974), *cert. denied,* 470 U.S. 955 (1975); (2) all but two nonrelevant tapes were sealed by Salicrup within five days; and (3) delays experienced by Salicrup were occasioned by innocent factors such as intervening weekends and the difficulty and delays attendant to securing accurate information from monitoring agents located at off-site listening posts.

13. ELSUR clerk Salicrup released tapes, which he had already secured, to agents prior to judicial sealing without notation on the FD-504 envelope of the reason why; a few FD-504 envelopes bear a second evidence tape seal indicating that they were re-opened.

The defendants argue that failure to document the purpose for accessing the tape on the face of the FD-504 envelope undermines the integrity of the chain of custody. However, the Court finds the defendants' argument lacking for the following reasons: (1) the essence of a valid chain of custody is the identification of the individuals who had possession of the tape and the date and time custody was transferred to another person. Knowledge of the purpose for which an individual obtained possession of a tape is not necessary to a proper chain of custody. Moreover, the defendants' argument to the contrary notwithstanding, notification on the FD-504 envelope of the purpose for which access to the tape as ostensibly gained would offer little protection against the large scale, wilfull tampering which the defendants have alleged occurred here. If one assumes that F.B.I. agents would access tapes for the purpose of tampering with them, one might also assume that the same agents would fabricate a legitimate reason for securing the tape and note that fabrication on

the FD-504 envelope; (2) the chain of custody documents and testimony elicited at hearing establish that the tapes never left the ELSUR room or the possession of the ELSUR clerk, and, hence, the chain of custody was maintained; and (3) many of the unexplained discrepancies cited by the defendants have in fact been satisfactorily explained. (These include the April 22, 1986, judicial unsealing of the tapes for duplication. In other instances, the reason for accessing the tapes was noted on the ELSUR log.)

Analysis:

An essential objective of Section 2518(8)(a) is to ensure that "[a]ppropriate procedures [be] developed to safeguard the integrity, and contents of the recordings to assure their admissibility in evidence." 1968 U.S. Code Cong. & Ad. News pp. 2112, 2193. *See United States v. Dimuro*, 540 F.2d 503, 512 N. 15 (1st Cir.), *cert. denied*, 429 U.S. 1038 (1976). Accordingly, where judicial sealing of tapes has been other than immediate:

> [E]vidence from which the court can infer that the tapes were held in such a condition as to ensure that they could not be tampered with will be an important component of the Government's "satisfactory explanation."

Johnson, 696 F.2d at 125. (considering a similarly-worded local law analog of Section 2518(8)(a) and late judicial sealing of tapes).

In *Mora*, the first circuit found that the purposes of the sealing requirement had been satisfied, in significant part, because despite "the fact that the evidence was not seasonably presented for judicial sealing, the . . . master recordings were kept under high security and in circumstances which betokened their continued integrity."

Mora, 821 F.2d at 869. *Accord United States v. Vazquez*, 605 F.2d 1269, 1278 (2d Cir. 1979) (all reasonable precautions against tampering should be taken both before and after judicial sealing is accomplished.)

Therefore, the Court is concerned with whether the chain of custody practices and procedures employed by the F.B.I. in this case were sufficient to preserve the accuracy of recordings and deter alteration of those recordings pending a judicial order sealing the tapes. The testimony elicited during the extended hearings concerning the issue chain of custody establishes that the F.B.I. utilized procedures which reasonably assure that the tapes were not tampered with.

In adherence to these procedures, monitoring agents noted the target location, reel number, date and time that the tape was started and his or her initials directly on the leader of the tape. The agent simultaneously prepared a FD-504 chain of custody envelope for each new tape, inscribing on that FD-504 form his or her name and the date and time which the tape was placed on the recorder. At the completion of the tape reel, the monitoring agent rewound the tape, placed it in its original box with a label affixed to the box showing the location, reel number, date of interception and the monitoring agent's initials. The box and reel were then placed into the FD-504 chain-of-custody envelope and the FD-504 envelope was delivered to the custody of ELSUR clerk in the ELSUR room at the F.B.I. office in Hato Rey, Puerto Rico. The overwhelming majority of tapes were delivered to the custody of the ELSUR room, a double-locked, restricted access room in the F.B.I. office in a guarded building in Hato Rey, Puerto Rico, within 12 hours of their completion. Virtually all tapes were transferred to the custody of the ELSUR custodian within one day. The only exceptions were three non-

relevant tapes which were delivered within two days, in one, related, incident.

Throughout this process, all original tapes remained in the custody of a F.B.I. agent whose name was recorded on the FD-504 envelope. Any change in the chain of custody was duly noted on the FD-504 envelope. The FD-504 envelope discloses the names of the agent releasing custody, the date and time custody was released and the name of the agent accepting custody as well as the date and time custody was accepted.

In the recent case of *United States v. Angiulo*, No. 86-1965, slip op. (1st Cir. May 24, 1988 (LEXIS, Genfed library, USAPP file), the first circuit had occasion to examine the chain of custody of original electronic surveillance tapes which a district court had authorized be temporarily unsealed and released to the custody of the government, so that they might be transported to F.B.I. headquarters in Washington, D.C. for enhancement. During the time that these exclusive copy, original tapes were temporarily unsealed, they remained in the sole possession of special agents of the F.B.I.

On appeal of the denial of the defendants' motion to suppress the "judicially unsealed" tapes, the First Circuit held that:

> In cases involving unsealing of tapes, there would seem to be no less of a risk of frustrating the purposes underlying section 2518(8)(a)—the assurance of the accuracy and genuineness of tape recordings—than in situations where the government fails "immediately" to place the original tapes under seal.

Id.

Accordingly, the court required that the government prove that the unsealing and use of the tapes did not result in any alteration or tampering. The Court of Appeals

determined that the government met its burden in *Angiulo*, relying upon its findings that: (1) "there was extensive examination and cross-examination of the agents involved in the custody . . . of the tapes while unsealed"; (2) "the chain of custody was clearly established"; (3) "extensive security arrangements were employed at the F.B.I. headquarters . . . where the tapes were kept"; and (4) the agents in possession of the tapes testified unequivocally that "there were no unauthorized persons with access to the tapes, no tampering, no deletions, and no additions." *Id.*

Here, as in *Angiulo*, there was "extensive examination and cross-examination of the agents involved in the custody of the tapes." During hearings which ran continuously from September 1, 1987, through May 5, 1988, the Court allowed direct and cross-examination of 20 agents of the F.B.I., selected by the defendants, who were involved in the creation and custody of the electronic surveillance tapes. These agents testified unequivocally about the extensive security arrangements which were employed in the chain of custody procedures, that there were no unauthorized persons with access to the tapes and that there was no tampering, deletions or additions to the tapes. (See preceding factual summary).

Applying the criteria articulated in *Angiulo*, this Court finds that the government has sustained its burden and has established by clear and convincing evidence that there was no tampering or alteration of the subject tapes.

B. PHYSICAL INTEGRITY OF THE TAPES

1. ***Originality of the Tapes:***

The defendants' expert, Michael McDermott, opined that the 166 tapes which the government plans to offer into evidence are copies, not the original recordings. He

has purported to base this conclusion upon a two-fold "finding:"

> (a) Test tapes made by a sampling of representative A700 and B77 Revox recorders showed that these machines left distinct erase head marks on the tape which were developable approximately 50% of the time through a process known as magnetic track development.
>
> (b) None of the 10 original sealed tapes and 47 duplicate originals that were made available to the defense contained a single developable erase head mark when tested by the same process.

According to Mr. McDermott, the sealed original recordings and corresponding duplicate originals had to be copies, since one would have expected to find developable erase head marks approximately 50% of the time if they were originals.

Methodology of the Defendants' Expert:

The individual offered by the defendants as a tape authenticity expert, Michael McDermott, acknowledged that his formal education bears no meaningful relationship to tape authenticity analysis. Moreover, Mr. McDermott did not provide the Court with any documentary evidence that he ever received any training in the field of tape authenticity analysis and he failed to produce any evidence to support his claim that he received tape authenticity training from one Frederick Lundgren.

On several occasions Mr. McDermott went to the F.B.I. technical facility in Newington, Virginia in order to make test tapes on seven Revox model B77 recorders and five Revox model A700 recorders. As the F.B.I. did not keep a record of the serial numbers of the specific recorders actually employed in the subject electronic surveillance, Mr.

McDermott was not able to ensure that the test tapes he created were made on the exact same machines which produced the tapes in issue. At Newington, the F.B.I. configured the equipment in a manner similar to its arrangement during the investigation. Mr. McDermott's purpose in making these tapes was to obtain exemplars of how the record and erase heads would imprint the tape.

The defendants' expert then subjected the test tapes to a process known as magnetic tape development. This procedure involves the application of a highly volative solution, containing magnetic particles, directly to the audio tape. The particles are attracted to the magnetic patterns recorded on the tape. When the fluid evaporates a visible representation of the magnetic patterns is left on the tape. These representations are called magnetic marks. Mr. McDermott photographed marks with a magnifying (macro) lens. He then applied the same process to the 10 sealed original tapes and 47 duplicate original tapes. He claimed to have observed 100 areas on these tapes, photographing those areas of the tapes where, according to the logs, erase head marks should have appeared.

The three means by which one can determine whether a developed mark is an erase head mark are: (1) measure the distance from the suspected erase head mark to the record head mark which corresponds to it; (2) measure the height of the suspected erase head mark; and (3) measure the distance between the two vertical marks thought to be created by an erase head.

The distance from a record head to an erase head in a recorder should be measured through the use of waveforr analysis, because of the curvature in the tape path from the record head to the erase head. This distance can also be measured through an overrecording technique. Mr. McDermott failed to employ either method. The Revox

A700 record head to erase head distances are 2½ inches, with a variation of no more than .04 inches. The record head to erase head distances in Revox B77 recorders is 1.06 inches, with a variation of no more than .05 inches.

In order for a mark to be considered an erase head mark, the distance from a suspected erase head mark should accord with the distance from a record head to an erase head in an A700 or B77 recorder. However, with one exception, none of the marks identified by the defense in their exhibits DX 2593- 2609, accord with the distances from record heads to erase heads in the appropriate recorders. In an effort to explain why his distance measurements are inconsistent with the distances from the record heads to the erase heads in the Revox recorders, Mr. McDermott asserted that his incongruous measurements were attributable to a "gate" theory which he was told of by Thomas Owen. This hypothesis, first mentioned by Mr. McDermott on redirect examination, attributes his inconsistencies in the distance measurements between record head marks and alleged erase head marks to a possible lack of synchronization between the record head "gate" and the erase head "gate."

The "gate" theory is fatally flawed in several respects and hence provides no explanation for Mr. McDermott's erroneous measurements. First, there are no "gates" in the Revox recorders. Indeed, Mr. McDermott was unable to point to the location of the "gates" on the Revox record head. In fact the term "gate" applies to digital circuity, while the circuitry in the Revox recorders is analog circuitry. Second, there is a protective timing device in the Revox B77 recorder, insuring that the signals to the record head and the erase head arrive simultaneously. Even were that timing device to fail, the resulting "contact bounce" would cause a deviation from the normal spacing between

the record and erase heads of no more than .004 inches in the B77 recorder. There is no contact bounce in an A700 recorder and erase heads in an A700 are not implemented through a relay. Hence, the theory does not even apply to an A700 recorder. Third, the gate theory cannot explain why Mr. McDermott's *stop* mark measurements are inconsistent, as even Mr. McDermott admitted that these marks are placed on the tape *after* the tape comes to a stop.

Mr. McDermott's claim regarding the distance between the record and erase heads are further undermined by his failure to produce a single photograph depicting both the record head and alleged erase head marks, leaving it for the Court to take upon faith his representations that the "erase" head marks were located the appropriate distance from the record head marks. Moreover, the evidence establishes that the Court cannot trust the accuracy of Mr. McDermott's testimony regarding these distances. For example, Mr. McDermott testified in relation to DX 2596 that he measured 1 inch from the record head mark and that is the location where he found the erase head mark. In point of fact, the alleged erase head mark is located ½ inch from the record head mark.

Another indication of erase head marks is height. The record head marks are limited in size to the width of the record path, whereas erase head marks extend beyond the record track and are identifiable by virtue of this feature. Two acceptable means exist for determining the correct height of Revox record head and erase head marks. The height may be determined by reference to the manufacturer's specifications and may also be ascertained through the use of an overrecording technique. Although Mr. McDermott had never before examined Revox recorders, he neither physically measured the height of an erase head of either the A700 or B77, nor did he ever seek to obtain this information from the manufacturer.

If a mark is developed on a recording tape, the fact that the interior tip of the mark is well-defined is inconsistent with a claim that the mark did not develop to its full height. While Mr. McDermott acknowledged that erase head marks should run to the edge of the tape, yet he admitted that none of the alleged erase head marks which he developed extended to the edge of the tape. Many of the photographs which Mr. McDermott made of these marks did not clearly depict the edges of the tapes, but, rather, were clouded in the residue of the magnetic track development fluid which he had applied too heavily. Testimony established that magnetic track development photographs can be taken without residue masking the edge of the tapes.

The third measurable feature of an erase head mark is the distance between the double spikes on the developed tape which reflects the distance that exists between the two vertical gaps in an erase head. In the operation of the recorder, these two vertical gaps do not move and the distances between them remains constant. The appropriate distance is determined by measuring the space between the two gaps on an actual erase head. Yet, Mr. McDermott never made such a measurement. The double gap distance in both the A700 and B77 erase heads is 2.7 mm. Mr. McDermott erroneously claimed that there is a difference in the spacings between these two Revox recorder models. Mr. McDermott asserted that four of his November 1987 test tape photographs showed double spike marks from an erase head. However, none of the distance measurements made from those photographs are the same. Furthermore, only one of those double spike measurements corresponds with the double gap measurement of a Revox erase head.

Methodology of the Government's Expert:

The government offered Ernest Aschkenasy as their tape authenticity expert. Mr. Aschkenasy holds Bachelor's and Master's degrees in electrical engineering and is a nationally recognized expert in the field of tape authenticity analysis, having participated in the analysis of the Watergate tape recordings. Mr. Aschkenasy was assisted in his examination of the tapes and the preparation of his expert report by Mark R. Weiss, a highly trained tape authenticity expert who was one of the authors of the Watergate Tape Report.

As a tape authenticity expert, Mr. Aschkenasy performed an analysis of original tapes which included critical listening, magnetic track development, waveform analysis, spectrographic analysis and electrical tape scanning. Mr. Aschkenasy subjected the tapes to critical listening of the recorded material for any inconsistent sounds or qualities (e.g. gaps, clicks, fades or discontinuities). His waveform analysis involved reproducing the recorded sounds during playback as electrical signals which were then displayed as waveforms on an oscilloscope. These displays, called waveform prints, were used to identify the source of any signs suggestive of falsification. Spectrum analysis is a method of determining the frequencies of all components of the electrical signal, both micro and macro. Spectrum analysis was the basis for sensitive tests concerning the originality of the evidence tapes. Mr. Aschenasy used spectrum analysis in this case to ascertain the number of "power hum" components on each tape (i.e. an original recording should display only one "power hum" component). Mr. Aschkenasy also employed a technique known as electronic tape scanning (E.T.S.) which permitted him to search out and identify erase head marks through waveform analysis. With E.T.S., through

the use of four-track scanning technique, Mr. Aschkenasy was able to search all four audio tape tracks for the presence of erase head marks. Through electronic tape scanning, Mr. Aschkenasy was able to identify erase head marks through waveform analysis. In contrast, the waveform analysis employed by Mr. McDermott was deficient because Mr. McDermott used a standard half-track head which did not permit him to scan the area of the tape which is outside the record track (i.e. a half-track head is only 2mm wide, while an erase head mark can be as high as 2.8mm).

The E.T.S. technique employed by Mr. Aschkenasy is one which is recognized as proper by recognized experts in the field of tape authenticity analysis. The Court finds the defendants' criticisms of this technique and Mr. Aschkenasy's testimony concerning his application of this methodology to be without merit.

Government's Expert's Findings:

Based upon his analysis of the 10 sealed original tapes, as described above, Mr. Aschkenasy testified without reservation that nine of those tapes are original recordings. In particular, Mr. Aschkenasy testified that he found ample evidence of originality, through both spectrum analysis and electronic tape scanning, to convince him that these nine tapes were originals. Mr. Aschkenasy found that El Centro tape #23 contained insufficient data to permit him to render an expert opinion as to that tape's originality. He also testified that there was insufficient data to permit a finding that El Centro tape #23 is not an original. Such a conclusion is entirely consistent with Mr. Aschkenasy's prior testimony that, in his experience as a tape authenticity expert, there is often insufficient data to

permit him to render an opinion on the authenticity of a tape, at least one-third of the time.

While initially unable to determine the means by which El Centro tape #23 could have been created without the presence of an erase-off mark at the conclusion of the conversation on the tape, Mr. Aschkenasy subsequently determined that the "normal" switch on the SAMR (immediately adjacent to the main, "run/off/auto," switch) would, if thrown, result in the absence of an erase head off mark.

The Court's Conclusions Regarding Originality Of The Tapes

Having considered the expert testimony and reviewed the exhibits, the Court finds that the government has sustained its burden of proving the originality of the subject relevant tapes by clear and convincing evidence. The government presented cogent proof from a highly trained and experienced scientist who demonstrated, through his expert reports and testimony, his competence and professionalism as a tape authenticity analyst.

Ernest Aschkenasy examined 10 sealed original and 32 duplicate original tapes. Based upon the results of a series of tests which included critical listening, magnetic track development, waveform analysis, spectrum analysis and electronic tape scanning, Mr. Aschkenasy demonstrated to the Court that nine of the ten sealed original tapes examined were original. In particular, the results of spectrum analysis testing and electronic tape scanning provided such clear indicia of originality that the Court was left with the abiding conviction that it was highly probable that these tapes are original. A tenth tape lacked sufficient data to permit Mr. Aschkenasy to establish by a reasonable degree of scientific certainty that it was either an original or a copy.

In an attempt to prove their claim that all 1011 tapes are copies, the defendants presented the testimony and report of Michael McDermott. However, neither Mr. McDermott nor his findings are credible. Mr McDermott exagerated the nature and extent of his training in tape authenticity analysis, created incomplete and misleading exhibits, gave erroneous testimony regarding critical measurements, failed to take important foundational measurements, displayed a surprising ignorance of relevant terms and audio equipment and had the temerity to give an "expert" opinion regarding tapes which he had never examined. Mr. Aschkenasy's analysis of all the markings which Mr. McDermott claimed were erase head marks demonstrated clearly that they were not erase head marks. In fact, erase head marks could not be found on either the sealed original or the duplicate original tapes because Revox recorders are designed not to leave such marks.

The Court's finding of originality is undermined neither by the fact that only 10 of the sealed original tapes were examined, nor by the inability to determine conclusively the originality of one of those ten tapes. Neither the defendants nor their expert requested access to the actual evidence tapes, the sealed originals, until six weeks into the subject Title III hearings and eleven months from the time Mr. McDermott commenced his examination of the tapes in this case. Prior to this time, Mr. McDermott had expended 145 hours analyzing cassette copies of tape recordings and 732 hours examining approximately 250 duplicate original tapes. By motion dated October 16, 1987, the defendants requested that all original reel-to-reel recordings be made available to their expert witnesses Frank[4] and Michael McDermott. The defendants also moved that they

[4] Frank McDermott, founder of Frank McDermott, Ltd., assisted his son, Michael McDermott, in connection with his investigation of the tapes. However, Frank McDermott was not called to testify concerning his work in this case.

be given sufficient funds and time to allow their experts to test all of the original reels.

The Court granted the defendants' motion in part, providing them with the opportunity to examine a sample of 10 original tapes. The ten tapes selected for examination were chosen by the defendants after their experts had reviewed both copies and duplicate originals of the tapes. Therefore, the defendants' selection of the ten tapes was an informed choice. Presumably, the defendants chose the ten tapes most difficult for the government to establish as original and free of tampering. Moreover, Mr. McDermott testified on redirect examination that the ten tapes were a representative sampling of the original tapes, sufficient for him to generalize with respect to the condition of all the other originals.

Furthermore, in light of the fact that a minimum of one-third of all tapes lack sufficient data for an expert to determine originality, coupled with the conclusion that a minor human error explains the absence of such data, the Court is convinced that the subject tapes are originals.

2. *Allegations of Tape Tampering:*

In addition to the issue of originality, the second component of the Court's inquiry into the physical integrity of the tapes concerns the question of possible tampering or alteration of the tapes. "[F]reedom from adulteration is a necessary part of what the prosecution must show. . . ." *Mora*, 821 F.2d at 868. The defendants have alleged that their expert witness made findings on the issue of tampering regarding "undocumented starts and stops" on the tapes. They claim that these "findings" provide strong

evidence that tapes may have been edited or altered. The defendants have asserted additional claims which they believe undermine the physical integrity of the tapes, including allegations that the tapes contain blanks and gaps; that the sealed original tape for Veja Baja telephone #855-9943 #40 was blank; and that there are conversations noted on the monitoring logs which do not appear on the tapes. It is noteworthy that the defendants have not claimed that a single conversation on the tapes has been altered or shows signs of tampering.

The Court has reviewed the defendants' claims of tampering, the testimony and reports of the parties' experts and the evidence of record and finds that the goverment has shown by clear and convincing evidence that there has been no tampering or editing of the subject tapes.

a. *Defendants' Particularized Claims of Tampering*

1. **Alleged Undocumented Stops And Starts:**

Mr. McDermott claimed that, employing the techniques of waveform analysis and critical listening, he discovered a total of 148 "undocumented stops and starts" in his review of 256 duplicate original tapes.[5] The defense has summarized the essense of their claim in the following terms:

> [T]he monitoring agents turned the recorder off and on without noting it on the log at least 148 times.

[5] In the expert report which Michael McDermott filed with the Court, he claimed to have identified a total of 365 undocumented stop and starts on the tapes which he examined. However, at hearing, McDermott testified that only 148 of the undocumented stop and starts were significant.

In turn, they have defined an "undocumented start and stop" as:

> [A] location on a tape where there is evidence the recorder was stopped and then started; there is no way to know how much time elapsed between the stop and start. It is "undocumented" because no log entry exists for it.

While the defendants claim that "undocumented" starts and stops are evidence of editing, it is clear from the above statement of their claims and definition of their terms that the nature of the editing which they are alleging occurred is not the kind of editing which Congress was concerned about when it enacted the provisions of Title III which require that intercepts be accomplished "in such way as will protect the recording from *editing or other alterations.*" 18 U.S.C. Section 2518(8)(a) (emphasis added.) Clearly, the form of editing which Congress sought to guard against was the editing of existing recordings, not "editing" what material would, or would not, be recorded on the tape.

The defendants charge that monitoring agents stopped and started the recorder without documenting the fact. The editing of which they complain is alleged to have occurred prior to, or during, the creation of the tapes. With its emphasis on protecting recordings from all forms of alteration, it is obvious that Congress was concerned with thwarting *post hoc* editing of tapes. "[T]he aim of the legislation is to ensure that the immaculacy of the *gathered* evidence remains unsullied." *Mora,* 821 F.2d at 867. (emphasis added.)

Moreover, the Court finds clear and convincing evidence in the record that the reasons for the existence of stop and start events on the tapes, to the extent that they exist, were innocent ones. The not infrequent, and often undocumented, phenomena of power surges and power

outages; the accidental turning off or on, or both, of the recorders by monitoring agents; recorder reels sticking; physical damage to the tapes; and the loss of tape tension, all would cause the machines to shut off automatically and explain the presence of undocumented stops and starts. Indeed, the defendants' own expert witness, Mr. McDermott, testified that many undocumented stops and starts are attributable to innocent explanations.

Furthermore, Mr. McDermott's "findings" regarding alleged undocumented stops and starts are of questionable validity because they are based, not upon his examination of any of the sealed original tapes, but are instead the result of tests he performed on copies of the 10 sealed original tapes and 256 duplicate original tapes. The duplicate original tapes have been handled by numerous individuals since they were recorded. It is known that some have been damaged in the process. In light of this fact, Mr. McDermott's testimony that the fact alleged undocumented stops and starts appear on copies of three of ten original recordings permits him to generalize with respect to the condition of all original tapes is fatuous.

2. Conversations Alleged To Be On The Log But Not On The Tape:

The defendants have alleged that there exist 28 instances where conversations are noted on the monitoring agents' logs but do not appear on the tapes. In setting forth this claim, they cite an alleged example and hypothesize that:

> Given that this is a tape that is missing two conversations that are summarized in the monitoring logs ("on log, not tape"), it is certainly possible that changes and additions were made to the monitoring log *after* the problem was discovered in an attempt to explain this anomaly. (emphasis added.)

Discounting the government's explanation that the equipment had malfunctioned (a fact which the monitoring agents had noted in the log), the defendants posited that:

> The more likely explanation, of course, is that the monitors were listening without recording and inadvertently took notes on the unrecorded part of the conversation.

As set forth in their brief, the entire substance of the defendants' complaint is: (1) that the monitoring agents listened without recording; and (2) that these agents doctored the logs, after the fact, if the agents had "inadvertently" taken notes on the unrecorded part of the conversation. However, the defendants' claim contains no allegation that the *tapes* were altered or tampered and, therefore, it is not properly before the Court in the instant motion.

In the present ruling, the Court is concerned with the physical integrity of the tapes. Through their "on log, not tape" claim, the defendants have neither alleged that the tapes themselves were tampered with or altered, nor have they presented the Court with any evidence suggestive of that claim. Accordingly, they have not stated a proper claim of tape tampering.

3. Vega Baja Telephone #855-9943 Tape #40:

The sealed original reel-to-reel recording for Veja Baja Telephone #855-9943 tape #40 was found to be blank when, pursuant to Court order and under Court supervision, it was to be duplicated. The duplicate original of this tape is intact and this tape had been deemed relevant by the government and selected for use in its case-in-chief. The defendants allege that this occurrence presents evidence of tape tampering.

The Court finds that this singular occurence is not evidence of government tampering. Before the blank tape was discovered, the government had made known its intention of using this relevant tape in its prosecution of the case. Under all the facts, it is not reasonable to conclude that this barren tape is proof of falsification or adulteration of the recording.

4. Additional Tape Anomalies Alieged By The Defendants:

In their proposed factual findings, the defendants alleged over two dozen tape anomalies which they assert exhibit "suspicious characteristics[.]" Some of the tapes and claims cited by the defendants have already been discussed and ruled upon, *supra,* (i.e. Vega Baja Telephone #855-9943 tape #40; and Taft Street Telephone #725-1629 tape #7 and El Cortijo Telephone #799-4524 tape #1); the others need not be addressed as they concern tapes which are non-relevant, have been suppressed or were determined to have been judicially sealed in a timely fashion. Nevertheless, a few observations by the Court are warranted.

The defendants have argued that the government, having been placed on notice of the defendants' claims, failed to have its expert examine all of the "inconsistencies and anomalies" regarding these particular tapes. It should be pointed-out, however, that the defense did not have their expert witness, Mr. McDermott, testify concerning most of these claims, either. Moreover, there was no "expert" report or testimony from the defendants' witness that was left unrebutted by the government's expert. The Court finds that, to the extent expert testimony would aid the Court in assessing the evidence, Mr. Aschkenasy provided sufficient expert testimony for the Court to make its findings.

Regarding the defendants' claims of gaps and breaks in the recordings[6], the testimony of both the defendants' witness and the government's expert convinces the Court that those gaps or breaks which exist in the recordings are attributable to the innocent occurence of "signal dropout" (i.e. the loss of the record impulse) during the electronic surveillance.

In summary, the Court finds that the government has sustained its burden and established by clear and convincing evidence the physical integrity of the tapes.

III. EXPLANATION FOR SEALING DELAYS: ADDITIONAL FACTORS

In this section of the ruling, the Court turns to additional factors beyond the issue of the tapes' integrity which the first and second circuits have recognized as integral elements in the determination of whether or not the government has provided a satisfactory explanation for the sealing delays. Although not an exclusive list, several key factors include: the length of the delay, prejudice to the defendants or benefit to the government because of the delay (referred to as good faith in *Mora*), cause of the delay, and the diligence of law enforcement officials in presenting the tapes for judicial sealing. In the case at bar, Department of Justice Trial Attorney, Frank Bove, was responsible for sealing the Levittown, Datsun Sentra, Taft Street, and El Cortijo tapes on October 13, 1984 and the Vega Baja tapes on June 15, 1985. Frank Bove was a member of a group which became known as the Special

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[6] Although no allegation concerning "gaps" or "breaks" in the recordings was set forth with regard to those tapes properly on review by the Court in this ruling, because the list of tapes cited by the defendants in their brief may not be an exhaustive list of their claims, the Court will entertain a general discussion of this claim.

Prosecution Unit in the United States Attorney's Office in Puerto Rico from April 3, 1984 through July 29, 1985. Although part of the Criminal Division within the Justice Department, the Unit worked with the United States Attorney's Office in Puerto Rico in investigating acts of terrorism and officaal corruption. Bove was assigned specifically to the terrorism investigation and was designated one of two supervising attorneys in the investigation of October 30, 1983 LAW rocket attack on the federal building in Hato Rey, Puerto Rico. Attorney Bove left the island on July 29, 1985. The other supervising attorney was Assistant United States Attorney, Robert Moreno was responsible for presenting the El Centro tapes for judical sealing on September 14, 1985. Neither Bove nor Moreno had previous Title III experience prior to April 27, 1984, the date on which the government sought its first order to conduct electronic surveillance as part of this investigation.

A. *THE OCTOBER 13, 1984 SEALING*

In regard to the October 13, 1984 sealing, Bove testified that he contacted federal judge, Perez-Gimenez, one week prior to the sealing and arranged with the judge to have the tapes sealed on October 11, 1984. Judge Perez-Gimenez came to the F.B.I. office in Hato Rey, Puerto Rico on October 11, 1984 and signed the order to seal the tapes. However, the physical sealing of the tapes did not actually occur until October 13, 1984. Bove testified that the judge was scheduled to meet with the Pope who was visiting in Puerto Rico during this period and did not seal the tapes on October 11, 1984. The Court and F.B.I. office were closed on October 12, 1984 due to the Pope's visit. The judge returned to the F.B.I. office on Saturday, June 13, 1985 to seal the tapes. Bove was not present at the F.B.I. office on October 13, 1984.

1. *The Levittown Tapes*

By its terms, the final extension to intercept oral communications at the Levittown apartment and wire communications at three public telephones near the apartment terminated on July 23, 1984. However, progress reports eleven (11) and twelve (12), submitted by Attorney Bove to Judge Perez-Gimenez, indicate that, in fact, the electronic surveillance terminated earlier. Bove reported in progress report eleven (11) that Filiberto Ojeda-Rios moved out of his apartment on July 3, 1984. In the course of his move, it came to the attention of the F.B.I. that the monitoring device may have been disconnected; however, the F.B.I. continued to monitor the residence until July 9, 1984. The F.B.I. also ceased monitoring the public telephones on July 9, 1984; no conversations had been intercepted at the public telephones after June 27, 1984. The monitoring equipment was not removed until July 26, 1984.

The application and order to seal the recordings generated at Levittown which included one-hundred and three (103) reel-to-reel recordings of oral communications, fifty-five (55) cassette records ("A" Tapes), and two-hundred and ninety-seven (297) reel-to-reel recordings of intercepted wire communications, was signed on October 11, 1984. The actual sealing of all the tapes occurred two days later on October 13, 1984 because of the Pope's visit. The Court will use the October 13, 1984 date as the date of the actual sealing.

As previously noted, the government is obligated under 18 U.S.C. Sec 2518(8)(a) to seal electronic surveillance tapes "immediately upon the expiration of the period of the order or extensions thereof . . ." The government did not present the Levittown tapes for judicial sealing "immediately" as that term has been interpreted. For example, the second circuit has suggested that any presentation

made more than two days after the end of the wiretap could not be considered immediate. *Vazquez,* 605 F.2d at 1278.

In determining the length of the delay in sealing the Levittown tapes, this Court initially asks when the final extension terminated. The monitoring device was not removed until July 26, 1984, three days after the extension, by a strict numerical calculation, terminated. However, all efforts to monitor the residence and public telephones ceased immediately after July 9, 1984 because the defendant, Filiberto Ojeda-Rios, moved out of the apartment. Moreover, the terms of the final Levittown extension authorized surveillance

> until communications are intercepted which reveal the manner in which Filiberto Ojeda-Rios, Hilton Fernandez-Diamante, Jorge Farinacci-Garcia, Elias Castro-Ramos, Avelino Gonzalez-Claudio, Norberto Gonzalez-Claudio, an unknown male, a/k/a, Andres Leon Pagan, an unknown female, Ivonne Melendez-Carrion, Orlando Gonzalez-Claudio, Luz M. Berrios-Berrios, an unknown male a/k/a Jose Perez-Moreno, Isaac Camacho-Negron, and others yet unknown, are participating in the above described offenses and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of thirty (30) days from the date of this order, whichever is earlier.

Thus, the order to conduct surveillance is written in the alternative; surveillance is authorized for thirty days or until the objectives of the wiretap are achieved. Under the facts of the Levittown surveillance, the objectives, as far as possible, were achieved when the monitoring actually ceased and the location was abandoned by the Filiberto Ojeda-Rios.

The issue, whether the obligation to seal "immediately" at the "expiration of the period of an order or extensions thereof," under 18 U.S.C. Sec. 2518(8)(a) is triggered when the objectives are achieved or when the thirty day period runs, has not been resolved. Appellate courts have recognized the dilemma without directly deciding it. The Badalamanti court affirmed the district court's determination of the length of the sealing delay. In fixing the delay at seven days, the district court used the date when the order terminated rather than when the actual interception ceased. Chief Judge Feinberg wrote,

> we believe that Judge Leisure properly found that the delay in this case began when the extension order expired, rather than when the interception actually ceased . . . even under the appellant's analysis, the judge found that the objective of the surveillance had not been attained [when surveillance ceased]. Because the facts of this case do not require us to decide the difficult question whether sealing delays must be calculated from the expiration date of the order or from the date its objective is achieved, we decline to reach that issue which was left open in *United States v. Vazquez,* 605 F.2d at 1278 n. 21

Badalamanti, 794 F.2d at 824-825.

Similarly, the Mora court declined to reach the issue, stating

> [B]ecause the facts of this case overall do not require us to reach the problematic issue of whether delays ought to be calculated from the expiration date of the warrant or from such earlier date as the objective of the tape is achieved, we leave the issue for another day.

Mora, 821 F.2d at 863 n. 4.

Although recognizing the issue, this Court, too need not resolve it in regard to the Levittown sealing delay. The Court's ruling is the same whether one calculates the delay from July 9, 1984 or from July 23, 1984. Under the July 23, 1984 expiration date, the delay in sealing the tapes is eighty-two days; using the July 9, 1984 date as the expiration date, the delay is ninety-six days. In both cases, the Court finds the delay to be excessive as a matter of law and suppresses the Levittown tapes. As the court in *Mora* recognizes, at some point the length of delay may be ". . . so great as to require automatic exclusion of the evidence." The delay in this case is at least twice as long as that sanctioned in *Mora*, 821 F.2d at 870 and almost six times as long as the two week period which the second circuit has described as "among the longest it is willing to tolerate." *Rodriquez,* 786 F.2d at 478, *citing Massino,* 784 F.2d at 158.

The government cites *United States v. Vastola,* 670 F. Supp. 1244 (D.N.J. 1987) and *Lawson,* 545 F.2d 557 for the proposition that this Court should sanction the Levittown delay as within the statutory bounds of Title III. In *Lawson,* the court denied the motion to suppress for failure to adhere to the statutory sealing requirement despite a fifty-seven day delay. "Fifty-seven days is not insignificant. We do not assign error to the failure to suppress the tape evidence on this ground because the appellants have not questioned the integrity of the tapes." *Id.* at 564. The Vastola court sanctioned, without much discussion, a four month sealing delay for the main reason that the "crucial factor . . . is the integrity of the tapes themselves . . . in the case at bar, the integrity of the tapes has not been challenged." *Vastola,* 670 F. Supp. at 1282.

That the third and seventh circuits sanction such lengthy delays where no challenge to the tapes' integrity has been made is consistent with the Court's earlier analysis of the

varying approaches taken by the circuits when confronted with a late judicial sealing. The third, fifth, and seventh circuits have adopted an approach where in courts are directed to address whether the congressional purpose behind the sealing requirement, i.e., maintaining the integrity of the tapes, as been met. The burden is on the defendants to prove that the tapes have been tampered with. These circuits are less concerned with the issue of the government's explanation for the delay than with the question of the tapes' integrity. *See United States v. Falcone,* 505 F.2d 478, 484 (3d Cir. 1974), *cert. denied,* 420 U.S. 955 (1975); *United States v. Diadone,* 558 F. 2d 775, 780 (5th Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978); *Angelini,* 565 F. 2d 469; *Lawson* 545 F.2d at 564.

The approach taken by the first circuit and second circuit, at the time all tapes in this investigation were sealed, is somewhat different. A court is directed to ask whether or not the government has a satisfactory explanation for the delay. The integrity of the tapes is one factor, albeit a significant one, considered by the court in resolving the issue. The integrity of the tapes alone, however, is not dispositive. ". . . Standing alone, warranties of driven snow purity, proven beyond peradventure, will not suffice to constitute a satisfactory obligation." *Mora,* 821 F.2d at 868; *accord Rodriquez,* 786 F.2d at 477 (no evidence that tapes have been tampered with does not relieve the government of its burden to present a satisfactory explanation); *Johnson,* 696 F.2d 115.

The government also argues that the delay in sealing the Levittown tapes is not eighty-two or ninety-six days but rather seventeen.[7] This figure is arrived at by describing

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[7] The government erroneously claimed that the El Cortijo tapes were sealed on October 11, 1984, and, therefore, calculated the sealing delay as seventeen rather than nineteen days.

the El Cortijo wiretap, the tapes from which were sealed nineteen days after the expiration of the final order, as an extension of the Levittown. The Court rejects this argument. On February 25, 1987, in a ruling entitled, "Ruling on Defendant Luz M. Berrios Berrios' Regarding Violations of 18 U.S.C. 2517(5)," this Court noted that "the sole reason for the switch from the Levittown location to the El Cortijo location was that the individuals targeted in the Levittown residence moved to the new residence in El Cortijo . . . [T]he El Cortijo surveillance was, in reality, genuinely an extension of the Levittown operation." *Id.* 19 n.1 The government misinterprets the significance of this note. The Court's reference to "extension" in the February 25, 1987 ruling referred in a general sense to the expansion of the electronic surveillance investigation which commenced at Levittown. The note was not a finding by the Court that the El Cortijo wiretap was an extension as that term has been defined. "[T]he term extension as used in the phrase period of the order or extension thereof is to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however designated, where the surveillance involves the same telephone, the same premises, the same crimes, and substantially the same persons. *Vazquez,* 605 F.2d at 1278.

Applying this definition to the facts, the El Cortijo order was not an extension of the Levittown electronic surveillance. The first extension for Levittown sought "continued authority . . ." The initial application for surveillance at El Cortijo was not described as an application for continued surveillance. More importantly, El Cortijo is a completely different location than Levittown and the type of surveillance being conducted was also different. The F.B.I. was authorized at Levittown to intercept oral communications using a microphone at the Levittown apartment and wire communications at three public tele-

phones; the El Cortijo surveillance was a tap of a private telephone. Based on the aforementioned definition, the Court finds that the El Cortijo wiretap was not an extension of Levittown, and the motion to suppress all reel-to-reel recordings and "A" Tapes generated from the surveillance at Levittown is granted.

2. ***The Datsun Sentra Tapes***

The initial Datsun Sentra order was executed on May 11, 1984. Five extensions were subsequently authorized; the final extension terminated on October 10, 1984.[8] The process to seal the Datsun sentra cassettes commenced the following day but because of the Pope's visit, the actual sealing did not occur until October 13, 1984. The three day delay in sealing was minimal and did not violate U.S.C. Sec. 2518(8)(a). The Court finds that the Datsun Sentra tapes were sealed "immediately" as that term has been defined. *See Rodriquez,* 786 F.2d at 476 (court recognizes a minimal two day delay satisfies the immediacy requirement).

A two day hiatus occurred between the expiration of the fourth and authorization of the fifth extension. The fourth extension terminated on Saturday, September 8, 1984 and an extension was granted on Monday, September 10, 1984. The Court finds that the sealing requirement was not triggered by the two day hiatus. This finding is based on a determination that: 1) the fifth extension was, in fact, an extension as the term has been defined, 2) the govern-

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[8] The government sought an order to continue electronic surveillance of the Datsun Sentra on October 26, 1984; the government does not argue that this October 26, order, sought sixteen days after the expiration on October 10, 1984 of the September 10, 1984 final extension, was, itself, an extension. No communications were intercepted pursuant to the October 26, 1984 order.

ment has offered a reasonable, satisfactory explanation for the minimal delay, and 3). the sealing requirement is not triggered until the expiration of the order and all extensions thereof.

"The term extension, as used in the phrase, 'period of the order or extensions thereof' is to be understood in a common sense fashion as encompassing all consecutive continuations, of a wiretap order, however designated, where the surveillance involves the same telephone, the same premises, the same crimes and substantially the same persons." *Vazquez,* 605 F. 2d at 1278. Applying this definition to the question at hand, the fifth order was clearly an extension of the fourth. The fifth order covered essentially the same targets, covered the same location, and concerned the same crimes. Second, the government has adequately explained the two day delay, which ocurred over a week-end period. The absence of Stephen Trott, Associate Attorney General in Charge of the Criminal Division led to the two day hiatus. Attorney Trott, under whose authorization the applications in this Title III investigation were filed, was out of the country and unable to authorize the extension until Monday, September 10, 1984. *See Gigante,* 538 F.2d at 508 n. 11 (court remands to district court to determine if one order sought thirteen days after the termination of another order was an extension and, if so, whether the government had a satisfactory explanation for the delay): *United States v. Scafadi,* 564 F.2d 633, 641 (2d Cir. 1977) (hiatus between order and extension does not trigger the sealing requirement).

Moreover, although the government has proffered a reasonable explanation for the two day hiatus, the Court questions whether an explanation is necessary in light of the fact that a two day delay in sealing the tapes would not itself violate the immediacy requirement. The government intended to seek the extension and did so immediately on

Monday, September 10, 1984 when the Assistant Attorney General returned to the country and authorized the application for the extension.

Finally, the sealing requirement is implicated only at the termination of the period of the order or all extensions thereof. "Since the language of the statutes, the apparently prevailing practice and what case law there is supports the position that the government need not seal the tapes only after the termination of the extension of the original order, that is the position we adopt." *United States v. Fury,* 554 F.2d at 533. The sealing requirement is not triggered simply where the F.B.I. encounter problems in seeking an immediate renewal of an order or extension. Thus, the government was not obligated to present the tapes for judicial sealing until the expiration of the final extension on October 10, 1984.

The defendants argue that the delay in sealing the Datsun Sentra cassettes is seventy-one days. The basis for this claim is that no monitoring of the Datsun Sentra occurred after August 3, 1984. That no actual monitoring occurred after August 3, 1984 did not obligate the government to present the tapes for judicial sealing. A review of the relevant Datsun Sentra progress reports, filed by Bove to the authorizing judge, Chief Judge Perez-Gimenez, illustrates that electronic monitoring was not conducted because either the vehicle was not being operated and, therefore, the F.B.I. had no reason to activate the surveillance or the vehicle was lost to the F.B.I. The Datsun Sentra stationwagon was used regularly by the defendant, Filiberto Ojeda-Rios. However, the vehicle remained unoccupied, parked in front of the El Monte condominium from August 4, 1984 through September 21, 1984. On September 21, 1984, the vehicle was removed, without the knowledge of the F.B.I., from the El Monte condominium. The vehicle was next observed on or about October 24, 1984,

parked in front of #256 Calle 6, Barrio Guarico, Vega Baja, Puerto Rico, the suspected new residence of Filiberto Ojeda-Rios. However, on October 24, 1984 when the vehicle was again located by the F.B.I., the final thirty day extension had expired and the tapes had been sealed.

As the progress reports indicate, the F.B.I. did not cease electronic surveillance because the objectives of the surveillance had been attained. The monitoring device remained in the vehicle during this period and the F.B.I. intended to resume monitoring when the investigation indicated a need to do so, i.e., the vehicle had been located and was occupied by targeted individuals Thus, as previously noted in discussing the Levittown sealing delay,

> [B]ecause the facts of this case overall do not require us to reach the problematic issue of whether delays ought to be calculated from the expiration date of the warrant or from such earlier date as the objective of the tape is achieved, we leave the issue for another day.

Mora 821 F. 2d at 863 n.4.

The government was first obligated to present the cassettes for judicial sealing when the fifth extension expired on October 10, 1984. The presentment commenced the following day and was completed two days later on October 13, 1984. The Court finds that the Datsun cassettes were timely sealed and the motion to suppress is denied.

3. *The Taft Street and El Cortijo Tapes*

On July 27, 1984, the F.B.I. received authorization in a single order to intercept wire (telephone) and oral (microphone) communications at the Taft Street Apartment, telephone number (809) 725-1629 and at the El Cortijo residence, telephone number (809) 799-4524. Judge Perez-Gimenez authorized continued wire interception of the

telephone at El Cortijo and oral interception at both Taft Street and El Cortijo on August 25, 1984. An electronic device to intercept oral communications was never installed at either the Taft Street or El Cortijo residence because the F.B.I. could not effectuate a surreptitious entry. The tapes generated from the El Cortijo and Taft Street locations were sealed, together with the Levittown and Datsun Sentra recordings, on October 13, 1984.

The government did not seek continued authorization to intercept wire communications at Taft Street when the initial order expired on August 26, 1984. The Court holds, however, that the government was not required to present the Taft Street telephone tapes for judicial sealing on August 26, 1984. Pursuant to 18 U.S.C. Sec. 2518(8)(a), the government is not obligated to present recordings, generated from surveillance at a single location, for judicial sealing until the expiration of the final extension. The term "extension" as used in the phrase 'period of the order or extensions thereof,' is to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however designated, where the surveillance involves the same telephone, the same premises, the same crimes and substantially the same persons. *Vazquez,* 605 F.2d at 1278. The Court views the telephone and microphone surveillance at the Taft Street residence at inextricably connected, each being part of electronic surveillance at one facility. Applying the common sense definition of extension, as set forth above, the Court holds that the August 24, 1984 extension to continue microphone surveillance at the Taft Street residence was an extension of the electronic surveillance at Taft Street in a broader sense. Thus, the government was not required to present the Taft Street recordings, both telephone and microphone, until the expiration of the final extension which was on September 24, 1984.

The defendants allege that the sealing delay for the Taft Street telephone tapes is sixty-three days. This figure is arrived at by designating August 11, 1984 as the date on which the obligation to seal arose. Monitoring of the Taft Street telephone commenced on July 27, 1984. On August 11, 1984, the monitoring agents noticed that the recorder was registering activity with no incoming calls on the line. The monitors made a pretext call and a recorded message from the Puerto Rico Telephone Company informed the monitors that the number dialed was no longer in operation. In progress report two (2), dated August 16, 1984, Attorney Bove indicated to the judge that "No further calls have been monitored from this number as it appears to have been disconnected. If it is determined that the targets of this authorization obtain telephone service at apartment 1-C third floor, 172 Taft Street, Santurce, Puerto Rico, the government will promptly advise the court of any intention to monitor conversations further on such telephone line." The F.B.I. never resumed the telephone surveillance and the thirty day order expired by its terms on August 26, 1984.

The Court previously explored in its discussion of the Levittown tapes, the question, left open by the second and first circuits, concerning whether to calculate the delay from the expiration of the thirty days or from the time that the objective has been achieved because the government ceased monitoring with no intent to resume. In regard to the Taft Street Telephone surveillance, even under the latter analysis, the Court finds that the delay ought to be measured from the thirty day expiration of the microphone extension and not from the day that the actual monitoring ceased because the telephone was disconnected. The defendants, Juan Segarra-Palmer and Luz Berrios-Berrios, had not moved out of the residence, and the F.B.I. intended to reinitiate telephone surveillance as

indicated in progress report (2). Thus, the Court will measure the sealing delay from the thirty day expiration of the final extension which was on September 24, 1984. *See Badalamanti,* 794 F.2d at 825 (even applying defendant's analysis that the sealing delay ought to be calculated from the date the objective was achieved if earlier than the thirty day period, the court found that the government intended to resume monitoring during the remaining period of the order if the investigation indicated the need to do so). Using the September 24, 1984 date as the date of expiration, the tapes were sealed on October 13, 1984, nineteen days after the expiration of the order.

Turning to the El Cortijo telephone tap, the government sought a timely extension on August 25, 1984 to continue the surveillance. The order expired on September 24, 1984. The tapes were sealed nineteen days later on October 13, 1984.

The government clearly did not seal either the El Cortijo or the Taft Street telephone tapes "immediately upon the expiration of the period of the order or extensions thereof . . ." 18 U.S.C. Sec. 2518(8)(a). The Court must, therefore, determine whether the government has provided a satisfactory explanation for the delay of nineteen days in respect to El Cortijo and Taft Street. The government has cleared the first hurdle in their burden to provide a satisfactory explanation, proving by clear and convincing evidence the immaculacy of the tapes. The Court's finding of integrity of the tapes was based on an evaluation of the chain of custody and extensive expert testimony.

"Having (scaled) the initial hurdle, the government must [now] demonstrate that the delay in presenting the tapes for judicial sealing came about in good faith." *Mora,* 821 F.2d at 868. Good faith in *Mora* is characterized as having two components, that the delay not result in either benefit to the government or prejudice to the defendant. Under

this standard, the Court finds that the sealing delay came about in good faith. The delay did not impede the defense in any way. In fact, the defendants in their briefs do not make any argument of prejudice. Moreover, the government derived no benefit from its failure to seal immediately. The government had no need to use the original tapes during this period. Duplicate original tapes were available to it. The original tapes were maintained in the ELSUR room. The nineteen days were not used by the government to gain some tactical advantage. *See United States v. McGrath,* 622 F.2d 36, 42-43 (2d Cir. 1980) (no prejudice to the defendants).

The length of any particular delay is a factor in determining whether the goverment has proffered a satisfactory explanation for the delay. The length of the delay in *Mora* was described as a subset of the questions of tampering and good faith. "[T]he longer the delay, the harder it may become to show any good faith or the absence of undue prejudice." *Id.* at 868. Although the nineteen day delay, in regard to both Taft Street and El Cortijo, is not insignificant, the court does not deem it to be so great as to require automatic exclusion. The court in *Mora* sanctioned, after a complete analysis, a forty-one day sealing delay. That lapse was not deemed sufficient as a matter of law to merit supression of the tapes. *Id.* at 870. In light of the government's proof that the tapes are pristine and the lack of any evidence on the record that the defendants were prejudiced or that the goverment benefited by the delay, the length of the sealing delays is excused.

The final factor which the Court must analyze is the cause which led to the delay. In this case, the delay was the result of Attorney Bove's misunderstanding of the phrase "order and extensions thereof" as the term appears in 18 U.S.C. Sec. 2518(8)(a). Bove was aware of the obligation to present the tapes for judicial sealing. However, since

targets of this investigation changed residences and vehicles so frequently, he considered the interceptions at various locations to be interrelated and part of the same investigation. In light of Bove's perception that all orders and extensions were related, he believed the statute required sealing when there existed a hiatus in the electronic surveillance orders as a whole. "I [Bove] made the decision in October to seal the tapes because there was, apparently to us, we were basically at a dead-end at that point in the investigation. We had neither authority nor capability—we had authority but no capability of listening anywhere . . ." In other words, Bove did not believe the sealing requirement was triggered until the F.B.I. lacked the physical or legal capacity to conduct electronic surveillance in the investigation as a whole where all interceptions were related. On October 10, 1984 when the Datsun Sentra surveillance order expired, the F.B.I. lacked either the physical or legal capacity to conduct electronic surveillance at any location. Although two orders to intercept oral communications from two vehicles were outstanding at this point in the Title III investigation, the monitoring devices had not been installed in either vehicle. Consequently, when the fifth extension to conduct surveillance of the Datsun Sentra expired, Bove perceived the need to seal the tapes. This misunderstanding of the statutory sealing requirement was the sole reason for the delay. Nothing in respect to his schedule prevented him from presenting the tapes for judicial sealing before this time.

Bove erred as a matter of law in maintaining the notion that the sealing in a multi-site electronic surveillance investigation was required when the government lacked either the physical or legal capacity to conduct surveillance at any location. However, Bove testified that he read the statute prior to commencing the Title III investigation. He also had access to the following reference materials,

Clifford S. Fishman's treatise entitled *Wiretapping and Eavesdropping,* a memorandum which summarized the key elements of Title III from William Corcoran, a Justice Department Trial Attorney, and materials from a Georgetown Law Journal Article. In addition, Bove spoke frequently with other attorneys within the Department of Justice but none of these attorneys indicated to him that his interpretation was in error. He spoke with Judge Perez-Gimenez one week prior to the October 13, 1984 sealing, and the judge did not comment on the delays. Thus, nothing in the record indicates that Bove intentionally ignored the applicable law or deliberately failed to seal the tapes. Rather, he believed his interpretation was within the law and no evidence is on the record that even suggests he purposefully flouted the requirement or failed to carry out his duties. Rather, Attorney Bove "acted in ignorant bliss and negligently . . . he was not consciously or deliberately failing to perform his duty." *Mora,* 821 F.2d at 870.

In light of the theory under which Bove was operating, that the actual sealing on October 13, 1984 was not time consuming is irrelevant. Once Bove believed he was required to present the tapes for judicial sealing, he acted diligently to complete the task. He contacted the judge one week before the date he believed was the required date. He coordinated the sealing process with Special Agent Jose Rodriquez and the ELSUR clerk, Roberto Salicrup, so that the tapes were ready for sealing one day after the expiration of the Datsun Sentra September 10, 1984 extension.

Considering all the factors, the proven immaculacy of the tapes, the length of the sealing delays for the Taft Street and El Cortio tapes, the lack of any evidence of prejudice to the defendants or tactical advantage to the government because of the sealing delay, the negligent

misunderstanding by the prosecutor of his statutory duties, and the lack of any bad faith on the part of law enforcement officials in completing the presentment of the tapes for judicial sealing, the Court finds the government's explanation for the sealing delays in regard to Taft Street and El Cortijo satisfactory. The motion to suppress the Taft Street and El Cortijo telephone tapes is denied.

B. ***THE JUNE 15, 1985 SEALING***

1. ***Vega Baja Residence and Telephone Tapes***

The government received initial authorization to intercept oral communications at the Vega Baja residence on November 1, 1984. The order terminated on Saturday, December 1, 1984. An extension was granted on December 3, 1984. Judge Perez-Gimenez, the federal judge who supervised the Title III investigation, was off the island until Sunday, December 2, 1984. Five additional extensions were granted; the final extension which was granted on April 30, 1985 terminated thirty days later on May 30, 1985. The tapes were sealed on June 15, 1985.

Authorization to intercept communications at two public telephones near the Vega Baja residence was initially authorized on January 18, 1985 and expired after thirty days on February 17, 1985. A subsequent order was sought twelve days later on March 1, 1985. The March 1, 1985 application was accompanied by a revised affidavit prepared by Special Agent Jose P. Rodriquez. The office of enforcement operation of the Justice Department, which reviewed all Title III applications, believed that because the investigation was lengthy, the practice of incorporating previous affidavits by reference was becoming too burdensome. Consequently, the March 1, 1985 affidavit, in support of the application for continued electronic surveillance, was revised and made more compre-

hensive. This revision took time; therefore, the government delayed twelve days in seeking the March 1, 1985 order. Additional extensions for continued surveillance of the Vega Baja pay telephones were authorized on March 31, 1985 and April 30, 1985. The April 30, 1985 extension expired after thirty days on May 30, 1985. The Vega Baja telephone tapes were sealed on June 15, 1985.

The first issue which confronts the Court in determining whether or not the government delayed in having the Vega Baja tapes judicially sealed is a determination of when the obligation to seal first arose. As the Court has noted, judicial sealing is required under 18 U.S.C. Sec. 2518(8)(a) "immediately at the expiration of the period of the order or extensions thereof . . ." Thus, the government was not obligated to seal the Vega Baja telephone or residence tapes until the order and all extensions for each had terminated. As this Court has repeated stated, the term extension is to be understood "in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however designated, where the surveillance involves the same telephone, the same premises, the same crimes and substantially the same persons." *Vazquez,* 605 F. 2d at 1278.

Using this common sense criteria, the Court finds that the December 3, 1984 order to continue oral surveillance at the Vega Baja residence was an extension of the first order despite a two day hiatus in seeking the extension. As the Court discussed in addressing the Datsun Sentra orders, "the mere fact of a gap between two orders [does] not foreclose viewing the second order as an extension . . . the identity of targets, crimes, and telephones tapped not the facts of a delay between orders is determinative." *Massino,* 605 F. Supp. 1565, 1577 (S.D.N.Y. 1985), *aff'd* 784 F.2d at 155 (2d Cir. 1986) (court accepts district court's findings of extensions despite hiatus); *Gigante,* 538

F.2d at 508 n. 11 (court remands to determine if an order sought thirteen days later is an extension and, if so, whether the government had an explanation for the delay). Comparing the first Vega Baja order and the December 3, 1984 extension, the location and crimes under investigation were identical and the group of individuals named as targets was essentially the same. The list of target individuals was expanded slightly in the December 3, 1984 extension due to the individuals intercepted pursuant to the first order. Thus, the December 3, 1984 order was an extension order as the term has been defined.

The hiatus in this case was two days. A delay of two days in sealing the tapes would not even violate the immediacy requirement in regard to judicial sealing, and the government would have no obligation to provide a satisfactory explanation. Similarly, the Court holds that the government is under no obligation to offer an explanation for the two day hiatus in seeking a renewal of the order to conduct electronic surveillance. Nevertheless, the government has offered a reasonable explanation for the hiatus. Judge Perez-Gimenez was off the island until Sunday, December 2, 1984. Although the absence of a judge is no longer accepted as a satisfactory cause for a sealing delay, the Court accepts the judge's absence as an explanation for the two day hiatus in seeking an extension order. Judge Perez-Gimenez was familiar with the Title III investigation in this case. He authorized all previous orders and been kept informed by progress reports of the status of the investigation. Thus, the government was justified in waiting two days, one of which was a Sunday, to seek the extension.

No further hiatus occurred in the course of the Vega Baja residence surveillance. The monitoring equipment did malfunction between February 1, 1985 and February 28, 1985. The F.B.I. was finally able to enter the premises sur-

reptitiuosly on February 20, 1985 to fix the equipment. Monitoring resumed for approximately one hour until the equipment against malfunctioned. These problems were corrected and monitoring resumed without further problems on February 28, 1985. (*See* progress reports sixteen (16), dated February 21, 1985, and eighteen (18), dated March 12 1985). The defendants do not argue and this Court does not find that the malfunction of the equipment implicates the sealing requirement.[9] *United States v. Santoro,* 647 F. Supp. 153, 163 n. 1 (E.D.N.Y. 1986) (a machine malfunction which caused interceptions to cease did not implicate the sealing requirement). Consequently, the obligation to seal the Vega Baja residence tapes did not arise until the May 30, 1985 termination of the final extension. The tapes were not sealed until sixteen days later on June 15, 1985.

Turning to the Vega Baja public telephone surveillance, the Court looks initially at the twelve day hiatus between the expiration of the first order on February 17, 1985 and the subsequent March 1, 1985 order. The first order expired on February 17, 1985. Twelve days later, on March 1, 1985, the government sought an extension to continue to intercept telephone conversations. The March 1, 1985 order covered the same telephones, concerned the same crimes, and targeted the same individuals as the January

[9] The fact that the Vega Baja tapes were not sealed between February 17, 1985 and February 28, 1985, when the F.B.I. lacked the legal and physical capacity to conduct surveillance at any location does not discredit Bove's testimony in regard to the October 13, 1984 sealing for two reasons: 1). Bove testified that he viewed the investigation differently in February, 1985 than in October, 1984, and 2). Bove differentiated between a situation where the F.B.I. lacked physical capacity because a monitoring device had never been installed and one where the monitoring device malfunctioned temporarily.

18, 1985 initial order. Thus, it was an extension of the first as the term has been defined in *Vazquez,* 605 F.2d at 1278.

However, the second circuit in *Gigante,* 538 F.2d at 508 n.11 instructed the district court when confronted with this issue to ask not merely whether a subsequent order is an extension but also whether the government has offered a satisfactory explanation for a delay in seeking an extension. In the present case, the Court does not find the government's explanation for the delay satisfactory. As noted, the Justice Department required that the F.B.I. revise its affidavit because of the length and complexity of the Title III investigation and resulting cumbersome process of incorporating previous affidavits by reference. The Court has compared the January 18, 1985 and the March 1, 1985 affidavits and finds that the changes necessary to complete this task were not that substantial. The government ought to have completed the task in a more expeditous manner. Thus, the Court does not accept the government's explanation for the twelve day delay and will regard the January 18, 1985 and the March 1, 1985 orders as separate and distinct; in other words, the Court does not view the March 1, 1985 order as an extension of the January 18, 1985 order.

Under this rationale, the delay in sealing the telephone tapes generated from the January 18, 1985 order was one-hundred and eighteen days (118). The Court finds the delay to be excessive as a matter of law and suppresses all tape generated pursuant to the January 18, 1985 order to conduct wire surveillance of the Vega Baja public telephones. (*See* III, A, 2-delay of eighty-two days in sealing the Levittown tapes is excessive as a matter of law).

The Court will view the March 1, 1985 order as a separate order from, and not an extension of, the January 18, 1985 order. The government sought and received timely extensions of the March 1, 1985 order on March 31, 1985

and on April 30, 1985 to continue the telephone surveillance. This final extension expired on May 30, 1985. The tapes were not, however, sealed until June 15, 1985.

The Court is faced with a sixteen day delay in sealing both the Vega Baja residence and pay telephones recordings. The government bears the burden in this case to present a satisfactory explanation for the delay. As previously noted, the threshhold question in evaluating whether the government has provided a satisfactory explanation is whether the government has proven the integrity of the tapes by clear and convincing evidence. The Court has addressed the issue in great detail and finds that the immaculacy of the tapes has been proven by the government.

The next factor to be considered is whether the delay came about in good faith, i.e., whether the delay resulted in prejudice to the defendants or benefit to the government. The record is simply bare of any evidence of prejudice to the defendants in this case because of the sixteen day sealing delay. All Title III tape recordings made in connection with this case were disclosed to the defendants shortly after their arrests in August 30, 1985. In addition, the government did not take advantage of the sixteen day delay in sealing the tapes either to tamper with the tapes or in any way use the tapes to gain some advantage in a more general sense.

The final factor which the Court must consider in reviewing whether or not the government has satisfied its burden of presenting a satisfactory explanation for the delay is the cause for the delay. Attorney Bove was responsible for presenting the tapes for judical sealing on June 15, 1985. On May 29, 1985, one day prior to the expiration of the final extension of both the residence and telephone taps, Bove addressed a memorandum to Special Agent in Charge Richard Held with an attention to the Supervisory Special Agent, George Clow. The memoran-

dum stated, "As you know our authorization for Vega Baja location expires on May 30, 1985. Since a decision has been made not to seek renewal of the order at this time, we again will be in the situation where we should seal all existing tapes of intercepted conversations pursuant to the provision of 18 U.S.C. Sec. 2518(8)(a) as we did on October 11, 1984. Advise me as soon as the tapes are ready for sealing so that we can coordinate with the Judge's schedule." (D.X. #2386)

Based on this memorandum and the testimony of Attorney Bove, the Court finds that Bove knew that the government was required to seal the tapes at the conclusion of the final Vega Baja extensions and was ready to effectuate the presentation of the tapes for judicial sealing. Nothing in Bove's schedule prevented him from presenting the tapes for judicial sealing immediately at the expiration of the extensions on May 30, 1985. Thus, the government's reliance on *Rodriquez,* 786 F.2d at 472 wherein the prosecutor's schedule and understanding of the Title III sealing requirements led to the delay is misplaced. Rather, the Court finds that it was misunderstanding and lack of communication between Supervising Attorney Bove and the F.B.I. which led to the delay.

Special Agent Jose Rodriquez who acted as the liaison between the prosecutor and the ELSUR clerk for the October 13, 1984 sealing left the island during the first week of June, 1985. Special Agent Rodriquez delegated the coordination task to Special Agent Marlene Hunter, and Special Agent Hunter testified that Rodriquez told her to wait for the prosecutor's call to initiate the sealing process. Special Agent Hunter testified that she was aware of the sealing requirement but not aware of the need for expedience in completing the task. Thus, she waited for the prosecutor to contact her.

Bove testified that it was his understanding that the F.B.I. were extremely busy during this time and could not effectuate the sealing presentation. Bove was partially correct in his belief. Agent Hunter testified that she was involved in preparing the search warrant affidavit for the numerous physical searches conducted on August 30, 1985, (*See* Court's Ruling dated September 18, 1987 on the issues of probable cause and particularity of the physical search warrants), reviewing physical surveillance logs, and preparing the affidavits to accompany the applications to conduct electronic surveillance of the El Centro Condominium and a 1980 Datsun Hatchback. However, both Marlene Hunter and Supervisory Special Agent George Clow testified that there was no personnel shortage and that, despite the busy schedule, they could have coordinated the sealing, if they were aware of the need for expedience.

After one week had passed, Bove did contact Hunter by telephone to initiate the sealing process by inquiring as to the number of Vega Baja tapes that needed to be sealed. Within one day, Agent Hunter contacted Salicrup for the information and communicated the number to Bove. Bove contacted the judge on Wednesday, June 12, 1985 or Thursday, June 13, 1985 to arrange to have the tapes sealed. Judge Perez-Gimenez was on trial during this period but agreed to seal the tapes on Saturday, June 15, 1985.

The unavailability of the issuing judge, Judge Perez-Gimenez, until June 15, 1985 is no excuse for failing to seal the tapes. Case law has established that the issuing judge need not be the judge who seals the tapes. *United States v. Poeta,* 455 F.2d 117, 122 (2d Cir. 1972), *cert. denied,* 406 U.S. 498 (1972); *Mora,* 623 F.Supp at 365 (no evidence that judge not available and no reason another judge could not seal the tapes); *Vazquez,* 605 F. 2d at 1280

n. 5. Thus, the misunderstanding and the lack of communication between the prosecutor and the F.B.I. stand as the central reasons for the delay. The Court finds that the misunderstanding came about in good faith. The prosecutor was not unjustified in his belief that the F.B.I. were extremely busy during this time, and Special Agent Hunter was not unjustified in following instructions and waiting for the prosecutor to call. The Court finds no evidence of intentional delay on the part of either the F.B.I. or the prosecutor. Moreover, the Court does not find that the prosecutor was

> consciously or deliberately failing to perform his duty . . . [the Court does] not condone or pardon such conduct, but [the Court] cannot condemn it as severely as if a purposeful attempt to evade the law or unfairly to pillory a suspect had transpired. Putting the worst face on things, the delays in this instance came about by honest mistake, negligently rather than intentionally.

Mora, 821 F.2d at 870.

In summary, the Court finds no evidence that Bove's conduct "bespoke any bad faith." *Rodriquez* 786 F.2d at 478. The government neither sought nor gained any tactical advantage by the delay and the defendants were not, in any way, prejudiced by the delay. The government has proven by clear and convincing evidence the integrity of the Vega Baja residence and telephone tapes. The misunderstanding between the prosecutor and the F.B.I. concerning who would initiate the sealing process, during a time when the F.B.I. were preoccupied with vital elements of the investigation does not, in the absence of other factors, merit suppression of the Vega Baja tapes.

> For these reasons, and in the absence of any indication that the [prosecutor] was motivated by imper-

> missible factors, the sixteen day delay was not unreasonable . . . This determination stands even though the [prosecutor] presumably was aware of the requirement under [Federal] law that the tapes be immediately sealed, and even though perhaps earlier arrangements should have been made concerning the judicial sealing of the tapes.

United States v. Lilla, 534 F. Supp. 1247, 1272 (N.D.N.Y. 1982).

Accordingly, the motion to suppress the Vega Baja residence tapes and the Vega Baja telephone tapes made pursuant to the March 1, 1985 order, and two subsequent extensions, is denied. The Court suppresses the Vega Baja telephone tapes made pursuant to the January 18, 1985 order.

C. *THE SEPTEMBER 14, 1985 SEALING*

1. *El Centro Tapes*

The final electronic surveillance conducted in this case was oral surveillance at the El Centro condominium. The El Centro condominium is alleged by the government to be a safehouse for Los Macheteros. A safehouse has been defined as an apartment, office, or home utilized by terrorists to meet, plan activities, store weapons, documents, and explosives, and hide from law enforcement officials.

Authority to intercept oral communications at El Centro was given on June 27, 1985. Two extensions were later authorized by Judge Perez-Gimenez on July 24, 1985 and August 23, 1985. As with all electronic surveillance orders in this case, the final El Centro extension contained a provision which authorized the surveillance to

> continue until communications are intercepted with reveal the manner in which Orlando Gonzalez-Claudio,

> Filiberto Ojeda-Rios, Luis Colon-Osorio, Roberto Maldonado, Ruben Ramon Acosta, Sylvia Mulling Cowart, Blanca Iris Serrano-Serrano and others yet unknown participated in the above described offenses and which reveal the identities of the confederates, their places of operation, and the nature of the conspiracy involved therein or for a period of thirty (30) days from the date of this order, whichever is earlier.

The extension is written in the alternative; authorization is granted for thirty days, which in this case was September 22, 1985, or until the objectives of the surveillance are achieved. In determining whether or not the government delayed in presenting the El Centro tapes for judicial sealing, the Court must address the issue left unresolved by both the first and second circuits and which the Court previously had no need to resolve (See III,A,1,2, and 3). On August 30, 1985, twenty-three days before the order expired by a strict numerical computation, the F.B.I. executed a warrant to search the El Centro condominium. The F.B.I. conducted numerous other physical searches on this day in conjunction with the arrests in Puerto Rico of eleven of the defendants in this case. El Centro progress report ten (10), dated September 4, 1985, from AUSA Roberto Moreno to Judge Perez-Gimenez indicates that electronic surveillance at El Centro ceased on August 30, 1985 because of the physical search. "The interception of these premises terminated on August 30, 1985 due to the execution of a search warrant on this location." The monitoring logs indicate that no monitoring was attempted after August 29, 1985, and, unlike the situation at Taft Street, the F.B.I. did not note in any progress report its intent to reinitiate interception if the investigation revealed the need to do so. In fact, the monitoring device was removed by the F.B.I. in the course of the August 30, 1985

search. (See, affidavit of Special Agent Jose P. Rodriquez, Def. Ex. #2377). Thus, based on the facts before this Court, no intention existed nor did the F.B.I. retain the capability to continue interception after August 30, 1985 at the El Centro condominium.

The government is correct when it argues that three defendants in this case, Avelino Gonzalez-Claudio, Norberto Gonzalez-Claudio, and Victor Manuel Gerena, were not apprehended on August 30, 1985 and continue to be fugitives. However, this fact is irrelevant to a determination of when the extension to conduct electronic surveillance at the El Centro terminated for sealing purposes. The three individuals were not even named as targets in the El Centro order. Thus, the objectives of the wiretap were achieved on August 30, 1985 and the authorization terminated by its alternative terms on that date. The question, therefore, is whether this sort of termination triggers the requirement that the tapes be presented "immediately" for judicial sealing.

The second circuit in *Badalamanti,* 794 F.2d at 825, upheld the district court's finding that the mere cessation of electronic surveillance, prior to the expiration of the thirty day period, does not, without more, trigger the sealing requirement. The issue, however, is whether the sealing requirement is triggered when the objectives of the surveillance, in light of the facts of a particular case, are reached if that period occurs before the thirty days has run. Judge Lasker in *United States v. Ricco,* 421 F. Supp. 401 (S.D.N.Y. 1976), *aff'd,* 566 F.2d 433 (2d Cir. 1977), *cert. denied,* 436 U.S. 926 (1978) and Judge Kram in *United States v. Morgan,* 646 F. Supp. 1038, 1040 n. 3 (S.D.N.Y. 1986) calculated sealing delays from the date of the arrests of the targets when that date was earlier than the thirty day period. In *Morgan,* the thirty day order by numerical calculation expired on March 15, 1983. Actual

surveillance ceased on February 23, 1983, when the targets were arrested. The tapes were sealed on March 2, 1983, eight days after the arrests and conclusion of the wiretap and thirteen days before the thirty day period ran. Both the prosecution and the defense agreed, and the court accepted, that the delay in sealing would be calculated from the date of the arrests. Thus, the Morgan court found an eight day sealing delay. "The wiretap terminated when Morgan was arrested. Thus, there is no question that its objective was achieved on February 23, 1983, and that the wiretap would not recommence. The government does not ask that the delay be calculated from the expiration date of the order." *Accord Mora,* 821 F. 2d at 864 (use of the second warrant began on May 7, 1985 and ended on May 16, 1985 with the arrest of the suspects. The United States acknowledges that, inasmuch as this eavesdropping culminated in the arrest and apprehension of the suspects on May 16, 1985, the span of the sealing delay must be calculated from that date forward . . .).

This theory comports with the legislative history of Title III. "The period of authorized interception is intended to begin when the interception-in fact-begins and terminate when the interception-in fact-terminates. This will be a question of fact in each case." 1968 U.S. Code Cong. & Admin. News, 2112, 2192. In addition, under 18 U.S.C. Sec. 2518(5) "no order entered under this section may authorize or approve the interception of any wire, oral or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty (30) days."

As cited above, in the final El Centro extension, authority to intercept is not conferred for simply a fixed number of days but rather is written in terms of thirty days or until certain communications are intercepted, i.e., the objectives are achieved. Thus, where the F.B.I. achieves

its objectives, as evidenced by the arrest of the defendants, actually abandons the electronic surveillance operation, and removes the electronic device from the premises before the thirty day period has run, the order has expired by its own terms. Sealing under 18 U.S.C. Sec. 2518(8)(a) is required "immediately at the expiration of the period of the order or extensions thereof." Thus, the Court holds that the sealing delay ought to be calculated from the day of the arrests when the monitoring device was removed and no further intent to conduct electronic surveillance existed. The Court recognizes that the issue has not been resolved by either the first or second circuit and that this holding places a greater burden on the prosecutor to maintain oversight of an electronic surveillance operation in order to determine when tapes ought to be presented for judicial sealing. However, in light of the objectives behind the sealing requirement, the Court deems such oversight necessary.

> The purpose [of the sealing requirement] is to place the custody and disposition of evidence obtained through the tapes as much as possible under control and supervision of the court and thereby avoid the potential for tampering or for inadvertent abuse of the evidence. This being the purpose, it would not be rational to require the immediate sealing of the wiretap when the investigation continued up to the last of the thirty day order but to permit sealing to be postponed until the end of the thirty days where the wiretap investigation itself ends say on the second or third day of the thirty day period.

Ricco, 421 F. Supp. at 467.

Using the August 30, 1985 date as the day from which the obligation to present the tapes for judicial sealing arose, the delay in sealing the El Centro tapes is fourteen

days. Although the delay "is not miniscule, neither [is] it of *Gigante* proportions." *Vazquez,* 605 F.2d at 1279-1280 (delays from seven and thirteen days). The government has, however, offered a satisfactory explanation for the delay, an explanation which addresses the integrity of the tapes, the cause for the delay and absence of any showing of prejudice to the defendant or benefit to the government because of the delay.

The government has shown by clear and convincing evidence the immaculacy of the tapes, including a proper chain of custody. In addition, the record is devoid of any evidence that the government benefited from, or that the defendants were prejudiced by, the delay. Therefore, under the terminology set forth in *Mora,* the delay came about in good faith.

Assistant United States Attorney in Puerto Rico, Roberto Moreno, was responsible for presenting the El Centro tapes to the judge for sealing. Attorney Bove had left the island on July 29, 1985. Attorney Moreno testified that he believed he had until the termination of the thirty days of the final extension, September 22, 1985, to present the tapes for judicial sealing. In other words, Moreno believed that the sealing requirement was triggered at the end of the thirty days and not when the surveillance ceased because the objectives of the investigation were attained. He prepared the application and motion to seal on September 13, 1985, and the tapes were judicially sealed September 14, 1985, eight days earlier than Moreno believed was required.

Moreno acted diligently in taking such steps to seal the tapes in light of his other responsibilities at this time. Eleven defendants were arrested in Puerto Rico on August 30, 1985 pursuant to an indictment handed down in Hartford, Connecticut. Numerous physical searches were also conducted on this date. AUSA Moreno was in charge of

reviewing the search warrants which were all approximately fifty pages in length and, after August 30, 1985, handled all the hearings under F.R.Cr.P.40, commitment to another district, as well as all motions filed by any defendant. Special Agent Marlene Hunter described the situation in Puerto Rico at this time as "almost chaotic."

Given the uncertainty of the law concerning when the obligation to present tapes for judicial sealing arises in the situation confronted by AUSA Moreno, together with the responsibilities of AUSA Moreno at the time, the Court finds no intent to flout the sealing requirement. AUSA Moreno acted diligently under the circumstances. *See Poeta,* 455 F.2d at 122 (court accepts as a satisfactory cause for the delay, where no suggestion of bad faith by the government or prejudice to the defendant, the prosecutor's erroneous belief that the issuing judge had to seal the tapes). *Rodriquez,* 786 F.2d at 478 (court excused a fourteen day delay caused by prosecutor's schedule and erroneous belief a final report had to accompany the tapes at the time of sealing).

The Court finds that the government has carried its burden to show a satisfactory reason for the fourteen day delay and the motion to suppress the El Centro tapes is denied.

CONCLUSION

For the foregoing reasons, the defendants' motion to suppress the Title III recordings for failure to comply with 18 U.S.C. Sec. 2518(8)(a) is granted in part and denied in part. The Court orders only the suppression of the Levittown tapes and the tapes generated pursuant to the January 18, 1985 order to conduct wire surveillance of two public telephones at Vega Baja.[10]

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of July, 1988.

/s/ T. Emmet Clarie
T. EMMET CLARIE
Senior District Judge

[10] The Levittown and January 18, 1985 Vega Baja telephone interceptions, although illegally obtained, can still be used for impeachment purposes. *See United States v. Winter,* 633 F.2d 1120, 1154 (1st Cir. 1981), *citing, United States v. Havens,* 446 U.S. 620 (1980).

APPENDIX A

LOCATION	Expiration Date: By Expiration of 30-day Order or Final Extension	Expiration Date: By Cessation of Actual Monitoring	DATE SEALED	By 30-day Order	By Actual Cessation
Levittown Apt. & 3 Public Telephones	July 23, 1984	July 9, 1984	October 13, 1984	82 days	96 days
Datsun Sentra	October 10, 1984	N.A.	October 13, 1984	3 days	–
Taft Street & El Cortijo Residences & Telephones	September 25, 1984	N.A.	October 13, 1984	19 days	–
Vega Baja Residence	May 30, 1985	N.A.	June 15, 1985	16 days	–
Vega Baja Telephones (January 18, 1985 Order)	February 17, 1985	N.A.	June 15, 1985	118 days	–
Vega Baja Telephones (March 1, 1985 Order)	May 30, 1985	N.A.	June 15, 1985	16 days	–
El Centro Condominium	September 22, 1985	August 30, 1985	September 14, 1985	0	15 days

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CRIM. NO. H-85-50

UNITED STATES OF AMERICA

v.

VICTOR MANUEL GERENA, ET AL.

November 1, 1988

RULING ON DEFENDANTS' TAPE ANOMALY CLAIMS

On August 22, 1988, the government sought an order directing the defendants to itemize the tape anomalies they contend were unresolved by the Court's *Ruling On the Defendants' Motion To Suppress Tape Recorded Evidence For Violation Of 18 U.S.C. Sec. 2518(8)(a)* (hereinafter "July 7th Suppression Ruling"). That motion having been granted, the defendants filed a *Notice Of Defense Claims Of Datsun Tape Anomalies* on October 3 and 11, 1988, claiming that chain of custody deficiencies and other anomalies render seven relevant Datsun Sentra tapes (3, 9, 21, 27, 30, 33 and 35) inadmissible. The Court conducted oral argument on October 17, 1988. Additionally, the Court has benefited by the testimony of twenty F.B.I. monitoring agents, F.B.I. agents involved in presenting the tapes for judicial sealing, the electronic surveillance clerk who maintained custody of the tapes after intercep-

tion, attorneys within the Department of Justice who supervised the Title III investigation, as well as defense and government experts in the field of tape authenticity. Against this considerable backdrop, the Court rejects the defendants' tape anomaly claims. All relevant tape recorded evidence from the Datsun Sentra, the Vega Baja residence and telephones, the Taft Street and El Cortijo telephones, and the El Centro condominiums is admissible in the government's case-in-chief.

I. CHAIN OF CUSTODY

The defendants contest the chain of custody of Datsun Sentra tapes 21, 27, 30, 33, 34 and 35. As set forth below, however, the Court rejects these claims; the tapes are admissible. The Court's prior analysis of the chain of custody procedures, *see July 7th Suppression Ruling,* at 31-35, applies to the claims enumerated in the defendants' October 3, 1988 *Notice Of Defense Claims Of Datsun Tape Anomalies.* The defendants' sundry claims shall be addressed separately.

With respect to Datsun Sentra tape 21, the defendants attach significance to its interception date of July 4, 1984, which is four days after the prior interception and eight days before the next interception. This argument is immaterial. Chain of custody, the issue at hand, is not affected by *when* a particular surveillance target is monitored. Rather, a chain of custody involves the ability to trace the history of a given tape recording from its creation to the point it is offered into evidence. *See July 7th Suppression Ruling,* at 30.

The defendants also challenge Datsun Sentra tape 21 because it was delivered to the electronic surveillance ("ELSUR") room the day after it was recorded. This does not impair the integrity of tape 21, however. FD-504

envelopes identify the agent who had custody of a particular tape. During the Title III hearings, three F.B.I. agents who handled Datsun Sentra tapes testified. Chain of custody issues with regard to Datsun Sentra tapes were developed by the defendants in the course of the hearings. *See generally,* Transcript (hereinafter "Tr.") of 2/24/88 Tr. at 123-124, 129, and 131-132; 2/25/88 Tr. at 16. After careful consideration of the many competing factors, the Court concluded that the defendants' suspicions and idle speculation (that a monitoring agent's overnight retention of a tape impairs that tape's integrity) are unfounded. *See July 7th Suppression Ruling,* at 24. The Court accordingly adopts and incorporates that finding in the instant matter.

With respect to Datsun Sentra tape 27, the defendants raise two claims. Noting that the interception took place on July 13, 1984, they point out first that tape 27 was not "ELSUR-sealed" until July 18, 1984, and, secondly, that the tape was re-opened on October 3, 1984 without explanation. Notwithstanding these claims, the Court finds that tape 27 is admissible.

Review of the FD-504 envelope associated with Datsun Sentra tape 27 reveals that electronic surveillance began at 1:40 p.m. on July 13, 1984, and that at 4:45 p.m., that same day, a Friday, the tape was released to the ELSUR vault. The government posits, and the Court concurs, that it is not surprising that the ELSUR clerk, Mr. Roberto J. Salicrup, did not accept custody of the tape until Monday morning, July 16, 1984, at 9:00 a.m. Upon accepting custody of tape 27, Mr. Salicrup sealed it two days later on July 18, 1984. Mr. Salicrup testified during the Title III hearings that he was responsible for ensuring that all information on FD-504 envelopes, tape boxes and tapes was correctly entered. If corrections were necessary, Mr. Salicrup had to locate the agent, 10/8/87 Tr. at 175-178, which was often made difficult because many agents

worked outside of the office. 10/16/87 Tr. at 215-221. The Court has previously found that ELSUR clerk Salicrup's practice of delaying the evidential sealing of tapes, in order to complete all necessary documentary information, heightens the reliability of the FD-504 records rather than lessens it. *See July 7th Suppression Ruling,* at 25. Thus a two-day sealing delay does not impair the chain of custody of Datsun Sentra tape 27.

The defendants' second allegation regarding Datsun Sentra tape 27 involves the re-opening of the FD-504 envelope on October 3, 1984. In its *Response To Defendants' Claims Of Datsun Tape Anomalies,* filed October 14, 1988, the government underscores testimony refuting the defense claim that the October re-opening has not been explained. *Id.* at 7-9. Reference to testimony tending to explain the re-opening is immaterial, however, because the Court has found that the tapes never left Mr. Salicrup's custody after he accepted them. *See July 7th Suppression Ruling,* at 30-31; 10/9/87 Tr. at 95-96; 10/8/87 Tr. at 178. Thus the chain of custody of tape 27 is not impaired by the re-opening on October 3, 1984, regardless of whether an explanation is forthcoming.

The defendants allege two chain of custody problems concerning Datsun Sentra tape 30, both of which are resolved by reference to the July 7th Suppression Ruling. The defense first notes that the tape was made on July 15, 1984, removed from the equipment at 6:00 p.m., but not submitted to the ELSUR room until 3:15 p.m. the next day. In addressing tape 21, *supra,* the Court reaffirmed that a monitor's retention of a tape on an overnight basis does not impair that tape's integrity. *See also July 7th Suppression Ruling,* at 24. The second complaint regarding tape 30 is that the "ELSUR-Seal bears no initials." Discussion on this point is not required because the Court has ruled previously that the occasional failure by Mr. Salicrup to initial or date the evidence tape seal does not undermine the integrity of the chain of custody. *See July 7th Suppression Ruling,* at 26.

The final alleged chain of custody deficiencies concern Datsun Sentra tapes 33, 34, and 35. The first challenge notes that the FD-504 envelopes bear virtually identical time entries even though they were recorded by agents in two different vehicles. Special Agent Loida Berzins O'Connell, the monitor for tape 33, testified that a monitoring agent's many responsibilities (e.g., driving the vehicle, maintaining radio contact over the F.B.I. radio, operating the electronic surveillance monitoring equipment, making notes as to the subject matter and time of interceptions, and avoiding detection) impede precise recording of time entries. 2/24/88 Tr. at 61, 96 and 128. That much of the surveillance in question took place at night, in the dark, only compounds the difficulty monitoring agents encountered. 2/24/88 Tr. at 62. The identical time entries therefore do not undermine the tapes in question.

The defendants argue further against the admissibility of Datsun Sentra tapes 34 and 35 on the ground that although the two tapes do not contain the same recorded material, the FD-504 entries indicate that interception on both tapes began on August 3, 1984, at 2:00 p.m. and concluded that evening at 11:45 p.m. Special Agent Homero Rivera recorded both tapes. He testified at length before the Court in December, 1987. Although the FD-504 entries and corresponding tapes are not in complete harmony, minor errors in time entries on FD-504 envelopes and/or electronic surveillance logs do not undermine the integrity of these tapes—especially where, as here, Agent Rivera's testimony gave no indicates that the integrity of tapes 34 and 35 had been compromised.

Lastly, with respect to tapes 33, 34 and 35, the defendants again note that the recordings were not delivered to

the ELSUR room until the following day. Adopting its earlier finding, the Court finds that the tapes are admissible. *See July 7th Suppression Ruling,* at 24.

II. TAPE ANOMALY CLAIMS

Having outlined their various chain of custody challenges on October 3, 1988, the defendants then filed a *Notice Of Defense Claims Of Datsun Tape Anomalies* on October 11, 1988, wherein they identify all tapes that, in their opinion, still await a determination on admissibility. The tapes in issue are Datsun Sentra tapes 3, 9, 27, 33, 34 and 35; each will be considered in turn.

The defendants mount two challenges against Datsun Sentra tape 3: (1) their expert, Mr. Michael McDermott, reports possible over-recording and (2) Agent Sandifer opined that the log did not appear to be in the handwriting of Agent Rodriguez. Neither claim, however, is persuasive.

First, with respect to the possible over-recording, the Court has determined that neither the defense expert nor his findings are credible. *July 7th Suppression Ruling,* at 45. Because the Court has found that Mr. McDermott exaggerated the nature and extent of his training in the area of his purported expertise, created misleading and often incomplete exhibits, erroneously testified about important measurements, failed to make critical foundational measurements, and attempted to render an expert opinion concerning tapes he never examined, the Court declines defense counsel's invitation to now credit Mr. McDermott's conclusion that a one second break in Datsun Sentra tape 3 means over-recording. That Mr. McDermott did not examine original Datsun Sentra tapes, 3/30/88 Tr. at 13 and 32, an action he characterized as a precondition to informed analysis, 3/22/88 Tr. at 49, only supports the

Court's refusal to attach significance to the one second break on tape 3.

The defendants also claim, with respect to Datsun Sentra tape 3, that Agent Sandifer testified on February 10, 1988, that the log appears not to be in the handwriting of Elizabeth Rodriguez. Review of the pertinent transcript pages that the defendants cite, 155-157, reveals only that part of the log is printed and part written. Datsun Sentra tape 3 is fully admissible.

Datsun Sentra tape 9, which was recorded on June 7, 1984, is also the subject of a challenge. According to the defense expert, tape 9 contains three undocumented breaks or possibly stop/starts in recording. This claim does not impair tape 9. Aside from the Court's finding that Mr. McDermott's conclusions lack merit, *supra,* one additional point is in order. To wit, after having considered a general discussion of the defendants' claims regarding " 'gaps' or 'breaks' in the recordings[,]" *July 7th Suppression Ruling,* at n. 6, the Court concluded that "those gaps or breaks which exist in the recordings are attributable to the innocent occurrence of 'signal dropout' (i.e. the loss of the record impulse) during the electronic surveillance." *Id.* at 53. This finding, absent new information to the contrary, is fully applicable to the instant matter. *See also* 2/24/88 Tr. at 62 (explanation for absence of certain time entries in automobile electronic surveillance logs, resulting in "undocumented stop/starts"); 3/30/88 Tr. at 32 (defense expert's acknowledgement that his testimony may have been based upon an examination of what may have been a fourth generation tape recording and that his findings have no application to the original tape).

The defendants have also identified Datsun Sentra tape 27 as recorded evidence that should be declared inadmissible. The challenges, which are to no avail, shall be addressed seriatum.

The first claim regarding this tape is that the FD-504 envelopes indicate tape 28 was recorded before tape 27. This is not as grave a problem as the defendants suggest. The monitoring agent, Loida Berzins O'Connell, testified that she made both tapes on the same day, that she did not write the numbers "27" and "28" on the envelopes, and that it appears the two tapes were mistakenly placed in the FD-504 envelope that had been prepared for the other. 2/24/88 Tr. at 158-162, 165-179; 2/25/88 Tr. at 32-69. Agent Berzins O'Connell testified that only she wrote the chain of custody entries on each FD-504. 2/24/88 Tr. at 158; 2/25/88 at 39 (regarding tape 27); 2/24/88 Tr. at 177 (regarding tape 28). The Court is therefore satisfied that the confusion surrounding the FD-504 envelopes does not impair tape 27.

The second claim regarding tape 27 is that "there are also numerous undocumented breaks on tape 27." Having addressed this issue, *supra,* the Court adopts and incorporates by reference its analysis and prior discussion.

The defense further alleges, without specific reference to the transcript, that "Agent Loida Berzins O'Connell accepted [*sic*] in her testimony that there were not only multiple breaks, but also extended silences." The Court's review of the transcript yields no support for the defendants' assertion. The only relevant testimony Agent Berzins O'Connell gave concerns a single instance of silence in one tape recording. The period of silence, moreover, was no more than twenty-four counter numbers. 2/25/88 Tr. at 58-59, 69. Significantly, when this issue was raised, the Court advised defense counsel to have their expert examine the claim. 2/25/88 Tr. at 66. The expert's report, DX 2591, does not refer to "extended silences" in Datsun tape 27. In fact, Mr. McDermott conceded that silence can be the result of signal dropouts. 4/12/88 Tr. at 100-107.

The final claim regarding Datsun Sentra tape 27 is that time entries in the electronic surveillance logs conflict with time entries in the physical surveillance logs. Claims of conflict between an ELSUR and physical surveillance log are irrelevant to the chain of custody and integrity of the pertinent tape recording, *see July 7th Suppression Ruling,* at 28-29, 51, and accordingly dismissed out of hand.

The final five tape anomaly claims pertain to Datsun Sentra tapes 33, 34, and 35. The first of these claims relates to a conversation between Luis Colon Osorio and his wife that was recorded out of sequence on tape 34 and was not recorded in the electronic surveillance log. The matter has been resolved to the Court's satisfaction, however, in light of the testimony of Agent Berzins O'Connell who, after having reviewed all three tapes, confirmed that Agent Rivera had simply mismarked tape 34 and 35 after having recorded on tape 34 twice—once before and once after having recorded tape 35. 2/24/88 Tr. at 20-21. The Court is further satisfied that neither tape was tampered with because Agent Berzins O'Connell recorded essentially the same conversations when she made Datsun Sentra tape 33 from another vehicle, using another electronic surveillance monitoring kit. *Id.*

The defendants' expert discovered seventeen undocumented stop/starts on Datsun Sentra tape 33. As was indicated *supra,* however, Agent Berzins O'Connell testified that she stopped the tape recorder and, due to the exigencies imposed upon an automobile electronic surveillance monitor, may not have made time entries corresponding to those in her electronic surveillance log. *See July 7th Suppression Ruling,* at 47-50.

The defendants also assert that there was conflicting testimony between Agents Rivera, Berzins O'Connell, and Sandifer about whether physical surveillance teams carried

one or two electronic surveillance kits. Assuming *arguendo* that two electronic surveillance kits were used, the Court finds dispositive the fact that absolutely no evidence was established to render significant the presence of two electronic surveillance kits among a team of physical surveillance agents.

The fourth claim is that Agent Rivera's FD-504 envelopes indicate that tapes 33 and 34 were placed in the recorders at 2:00 p.m. and removed at 11:34 p.m. This claim is not significant because Agents Berzins O'Connell and Rivera were in different vehicles operating different electronic surveillance kits. Since both agents were surveilling the same target, it is plausible that both may have begun and concluded their technical surveillance at the same time. The tapes are therefore not impaired.

In a related claim, the defendants note that the FD-504 envelope for tape 35 indicates that is was also placed in the recorder at 2:00 p.m. and removed at 11:34 p.m. As with the prior claim, the Court finds it to be of little merit. Because the FD-504 envelope entry "began technical surveillance" is not synonymous with placing a tape in a recorder, it is not necessarily true that tape 35 was placed in a recorder at precisely 2:00 p.m. Similarly, tape 35 may not have been "removed from the equipment" at 11:34 because "equipment" and "recorder" are separate entities. Agent Rivera interpreted "equipment" to mean the briefcase (T-4 kit) that contained the radio and recorder; when he wrote "removed from equipment," he was referring to his removal of the tapes from the briefcase. 12/3/87 Tr. 19-24.

Finally, the defendants contend that there is "considerable conflict" between the testimony of Agent Sandifer vis-a-vis that of Agents Berzins O'Connell and Rivera about whether the monitoring agents were "extremely emotionally upset about the conversation that they overheard." The Court's only concern, in addressing the anomaly claims, is the condition of the tape recorded evidence; the condition of the monitoring agents' emotions is irrelevant. The challenges concerning tapes 33, 34 and 35 are rejected.

III. CONCLUSION

Wherefore, based on the foregoing, the defendants' numerous tape anomaly claims are rejected. To the extent that the Court's July 7th Suppression Ruling left open the question of the admissibility of any tape recorded evidence, today's ruling closes that void as to all relevant tape recorded evidence from the Datsun Sentra, the Vega Baja residence and telephones, the Taft Street and El Cortijo telephones, and the El Centro condominiums, all of which is determined to be admissible in the government's case-in-chief.

SO ORDERED.

Dated at Hartford, Connecticut, this 1st day of November, 1988.

/s/ T. Emmet Clarie

T. EMMET CLARIE
Senior District Judge

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ORIGINAL

(2)

NO. 89-61

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL., RESPONDENTS

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in affirming the suppression of certain recorded fruits of electronic surveillance for violations of the immediate sealing requirement of 18 U.S.C. §2518(8)(a), where the government delayed sealing said tapes for at least eighty-two days due to its "disregard of the sensitive nature of the activities undertaken."

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MISCELLANEOUS

STATEMENT OF THE CASE

In the course of a protracted investigation, the FBI conducted court-authorized electronic surveillance at various locations in Puerto Rico between April 27, 1984 and August 30, 1985. Gov. App. 18a. The initial Title III order, entered on April 27, 1984, authorized interception and recording of oral communications at the residence of Filiberto Ojeda Rios in Levittown, Puerto Rico and wiretapping of several public telephones across the street from the residence. Gov. App. 3a. That order was extended on two occasions. The final extension expired on July 23, 1984, fourteen days after the government terminated its electronic surveillance at Levittown. The Levittown tapes were judicially sealed on October 13, 1984, ninety-six days after the surveillance ceased and eighty-two days after the expiration of the final extension order. Gov. App. 4a.[1/]

On January 18, 1985, as the investigation continued, the government was authorized to wiretap two public telephones in Vega Baja, Puerto Rico. That Title III order expired by its terms on February 17, 1985. The government obtained a new wiretap order, based on a revised affidavit, on March 1, 1985. That order was extended twice, finally terminating on May 30, 1985. All the tapes derived from the Vega Baja telephone wiretaps were sealed on June 15, 1985, 118 days after the

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1/ The government conducted electronic eavesdropping at several other sites during this interval. On July 27, 1984, the district court authorized surveillance at two locations, including Ojeda Rios' new residence in El Cortijo, Bayamon, Puerto Rico. Gov. App. 20a. No oral communications were ever intercepted from that location, though a wiretap of the residential telephone was carried out. Gov. App. 21a. In both the district court and the court of appeals, the government contended that the El Cortijo surveillance should be treated as an extension of the Levittown Title III orders, thus postponing the obligation to seal the tapes under 18 U.S.C. §2518(8)(a). Both courts rejected that argument, Gov. App. 68a-69a, 11a, and it has not been renewed in the government's petition for certiorari. Gov. Pet. at 18, n.13.

expiration of the January 18, 1985 order. Gov. App. 5a.[2/]

Following return of the indictment on August 23, 1985, defendants filed motions in the district court seeking to suppress all the recorded fruits of the government's widespread electronic surveillance on a variety of grounds, including violations of the judicial sealing requirement set forth at 18 U.S.C. §2518(8)(a). Def. C. A. App. 1, 10, 27. Evidentiary hearings on those motions spanned approximately ten months, concluding on June 28, 1988. On July 7, 1988, the district court issued a lengthy ruling (reprinted at Gov. App. 17a-96a) limited to the late sealing issue.[3/]

The district court ordered the suppression of the Levittown tapes as well as the fruits of the January 18, 1985 Vega Baja wiretap order due to the government's failure to comply with the statutory sealing requirement. The court accepted the government's explanation for tardy sealing with respect to all other Title III tapes generated during the sixteen months of electronic surveillance and declined to suppress them. Gov. App. 15a et seq. In the course of its decision, the district court did not resolve and explicitly declined to consider challenges raised by the defendants to the integrity of the suppressed Levittown tapes. Gov. App. 30a, n.3. A motion filed by the government for "clarification and reconsideration" of that footnote was denied. Def. C. A. App. 120.[4/]

2/ Both in the district court and the court of appeals, the government argued that the March 1, 1985 order should be deemed an extension of the January 18, 1985 order, thus postponing the government's obligation to seal the recorded fruits under the statute. That contention was rejected, Gov. App. 83a, 14a, and has not been renewed in the government's petition for certiorari. Gov. Pet. at 18, n.13.

3/ The district court subsequently addressed and rejected alternative grounds presented by the defendants to warrant suppression of all the government's Title III recordings. Def. C. A. App. 29-119. Those independent grounds for relief were raised, but not reached, in the court of appeals. Gov. App. 6a.

4/ In its petition for certiorari at 22, the government categorically declares, without citation to the record, "[T]here was no alteration of the tapes." The government also asserts (at 7) that the district court "[f]ound that the government had proved by clear and convincing evidence that the (continued...)

On the government's interlocutory appeal, the Court of Appeals for the Second Circuit affirmed the suppression of the Levittown and Vega Baja tapes. Agreeing with the district court that judicial sealing had been delayed for a minimum of eighty-two days, the court of appeals proceeded to consider whether the government had provided a "satisfactory explanation" pursuant to §2518(8)(a). The court of appeals specifically eschewed any automatic rule of exclusion based solely on the duration of sealing delay, Gov. App. 12a, and enumerated the relevant criteria:

> [t]he cause and length of the delay, the deliberateness of the statutory transgression, the integrity of the tapes, the tactical advantages or disadvantages accruing from the error, and other relevant factors in a given case must all be considered in answering the sole question which the statute requires to be asked, namely, whether there is "a satisfactory explanation for the absence" of timely judicial sealing.

Gov. App. 13a-14a.

Applying these factors to the record in this case, the court of appeals found the government's explanation for its delays in sealing unsatisfactory. The court concluded that the government's failure to seal the Levittown tapes in a timely manner "[r]esulted from a disregard of the sensitive nature of the activities undertaken." Gov. App. 12a. With respect to the late-sealed Vega Baja tapes, the court found no governmental explanation "[o]ther than an underlying cavalier conception that the sealing requirements are technical, rather than reflective of Congressional concerns about underlying constitutional

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4/ (...continued)
tapes being admitted into evidence were in their original form and had not been tampered with." With respect to the tapes at issue here, which were ordered suppressed and thus not admitted into evidence, no such finding was made and serious questions remain respecting their authenticity and integrity. Gov. App. 6a.

requirements." Gov. App. 14a.[5/] The court pointed out that the district court had made no findings respecting the integrity of the suppressed tapes, noting:

> The appellees make the point that even if we were to reverse the district court's orders of suppression and to remand for further findings, serious questions of authenticity and integrity would remain for determination and independent grounds for suppression would be at issue on appeal. These include the Government's alleged use of a secret recording system, its alleged deliberate destruction of tapes containing original material, and its alleged practice of eavesdropping without recording.

Gov. App. 6a.

5/ These specific findings by the court of appeals appear to conflict directly with the unsupported assertion in the government's petition for certiorari (at 20) that: "They [delays in sealing] did not result from carelessness, failure to give appropriate priority to the sealing requirement, or other sanctionable behavior." (emphasis supplied) According to the government, the sole cause of the sealing delay was "a perfectly reasonable misunderstanding" by the supervising attorney. Gov. Pet. at 22. The court of appeals ruled otherwise.

SUMMARY OF REASONS FOR DENYING THE PETITION

The government has petitioned this Court to grant certiorari in order to decide whether a delay in judicial sealing should result in suppression of tape-recordings under 18 U.S.C. §2518(8)(a) "even if the evidence establishes that the tapes have not been altered." Gov. Pet. at 11.[6/] Asserting that the approach employed by the Second Circuit "severely limit[s] the circumstances in which demonstrably unaltered tapes can be admitted into evidence where there has been a lengthy sealing delay," Gov. Pet. at 16, the government contends that no other court of appeals in the United States would have affirmed the suppression order entered here. Id. at 22. The government calls this case "an appropriate vehicle" for resolving what it characterizes as an "important" conflict among the courts of appeals. Id. at 11.

Contrary to the government's contention, this case does not present a conflict which merits this Court's attention. The various courts of appeals are in substantial accord in construing and applying the statutory sealing requirement. While some differences have emerged in analytical approach and emphasis, that diversity has rarely, if ever, had any practical consequences in the appellate courts. Indeed, during the two decades since the enactment of Title III, the various courts of appeals have affirmed or ordered the suppression of tapes for violations of the statutory sealing requirement in only one reported case other than this one.[7/] (pp. 8-11).

6/ At the outset, it should be noted that the government has framed the question in a manner that distorts the record and rulings below. Contrary to the government's suggestion, no findings were made in the lower courts as to the integrity of the tapes at issue here. See Gov. App. 6a; 30a, n.3.

7/ United States v. Gigante, 538 F.2d 502 (2nd Cir. 1976) (8-12 month delays in sealing unexplained by government). Gigante and the instant case manifest the two most protracted sealing delays of all the reported decisions on the subject since the enactment of Title III.

The government's characterization of the Second Circuit as singularly aberrant in its interpretation of the sealing requirement is similarly flawed.[8/] Like the other courts of appeals, the Second Circuit has identified the integrity of late-sealed tapes as a relevant factor in determining whether suppression is appropriate. An application of its prescribed criteria to the particular circumstances presented by each case has led the Second Circuit to refuse to order suppression due to sealing delays in ten of its twelve reported decisions since the enactment of Title III. In any event, the Second Circuit has exercised its supervisory powers to promulgate specific sealing procedures applicable to all future cases, which should render academic its prior applications of §2518(8)(a). (pp. 11-13).

Even if there were a square conflict concerning the application of the statutory sealing requirement which could be deemed important, the record and the rulings below would make this case an inappropriate vehicle to resolve said conflict. First, since the courts below made no findings as to the integrity of the late-sealed tapes, this case does not present the Court with circumstances where tapes were suppressed due to sealing delays despite findings that no tampering had occurred. Indeed, the issue of tampering was hotly contested in the trial court. Substantial issues about the integrity and authenticity of the tapes remain unresolved. Gov. App. 6a. Second, defendants raised, and the court of appeals acknowledged, several independent grounds for affirmance of the suppression order, including the government's use of a secret recording system, its deliberate destruction of original recordings, and its practice of listening without recording. Id. Third, this is not a case where the government had any reasonable explanation for its

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8/ In its petition at 22, the government declares that the sealing delays in this case would not have resulted in the suppression of evidence in any court of appeals other than the Second Circuit. Based upon the record in this case, that dramatic assertion is utterly without foundation and should be disregarded. It would be sheer speculation to guess at how any other court of appeals would respond to the unique circumstances of this case.

failure to comply with the statute. Rather, as the court of appeals found, the government committed a "dereliction" due to its "disregard of the sensitive nature of the activities undertaken" and "cavalier" approach to the sealing requirement. Gov. App. 12a, 14a. (pp. 14-15).

The government has failed to establish any "special and important reasons" for review, as required by this Court's rules. On the whole, prosecutors have had no difficulty complying with the simple, straightforward requirement of immediate sealing. Even where sealing has been delayed, the government has almost invariably managed to demonstrate a satisfactory explanation, thus fulfilling the terms of the statute. Neither the government's desire to relitigate the acceptability of its excuse for late sealing in this case nor its unhappiness with the express terms of §2518(8)(a) warrants the granting of certiorari. (pp. 15-17).

REASONS FOR DENYING THE PETITION

I. THE APPLICATION OF THE IMMEDIATE SEALING REQUIREMENT BY THE COURTS OF APPEALS HAS NOT PRODUCED ANY CONFLICT MERITING THIS COURT'S ATTENTION.

Notwithstanding the government's depiction of the courts of appeals as hopelessly divided in interpreting §2518(8)(a), a survey of all twenty-two reported appellate decisions respecting sealing delays[9/] reveals a vast area of common ground. To begin with, there is no dispute over the applicable language of the statute. Section 2518(8)(a) provides, in pertinent part, that Title III recordings shall be sealed under the direction of the authorizing judge "immediately upon the expiration of the period of the order, or extensions thereof." No appellate court has suggested that the term "immediately" as employed in the sealing statute should be accorded anything other than its customary meaning. The statute specifies:

> The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of any wire, oral or electronic communication or evidence derived therefrom under subsection (3) of §2517.

As the Court of Appeals for the First Circuit has observed: "This wording is crystal clear. It leaves no room to waffle ...." United States v. Mora, 821 F.2d 860, 866 (1st Cir. 1987).[10/]

Second, every court of appeals which has construed §2518(8)(a) has explicitly or implicitly treated a delay in sealing as equivalent to the absence of a seal in ascertaining whether the immediate sealing requirement has been violated and applying an appropriate remedy. E.g. United States v. Mora, 821 F.2d at 864-865 ("A tardy seal has no greater legal suasion than no seal at all."); United States v. Johnson, 696 F.2d 115, 124 (D.C. Cir. 1982); United States v. Diana, 605 F.2d 1307, 1311 (4th Cir. 1979), cert. denied, 444 U.S. 1102 (1980); United States v. Gigante, 538 F.2d 502, 506-507 (2nd Cir. 1976).[11/]

9/ Twelve of those decisions, including the instant case, emanate from the Second Circuit. United States v. Ojeda Rios, 875 F.2d 17 (2nd Cir. 1989) (82-118 day delays), cert. pending; United States v. Gallo, 863 F.2d 185 (2nd Cir. 1988) (5 day delay); United States v. Kusek, 844 F.2d 942 (2nd Cir. 1988) (8 day delay), cert. denied, ___ U.S. ___, 109 S.Ct. 157 (1988); United States v. Badalamenti, 794 F.2d 821 (2nd Cir. 1986) (7-13 day delays); United States v. Rodriguez, 786 F.2d 472 (2nd Cir. 1986) (14 day delay); United States v. Massino, 784 F.2d 153 (2nd Cir. 1986) (15 day delay); United States v. Ardito, 782 F.2d 358 (2nd Cir. 1986) (5 day delay), cert. denied, 475 U.S. 1141 (1986); United States v. McGrath, 622 F.2d 36 (2nd Cir. 1980) (3-8 day delays); United States v. Vazquez, 605 F.2d 1269 (2nd Cir. 1979) (7-13 day delays), cert. denied, 444 U.S. 981 (1979); United States v. Fury, 554 F.2d 522 (2nd Cir. 1977) (6 day delay), cert. denied, 433 U.S. 910 (1978); United States v. Gigante, 538 F.2d 502 (2nd Cir. 1976) (8-12 month delays); United States v. Poeta, 455 F.2d 117 (2nd Cir. 1972) (13 day delay), cert. denied, 406 U.S. 948 (1972).

The ten cases decided by the other courts of appeals include: United States v. Mora, 821 F.2d 860 (1st Cir. 1987) (5-41 day delays); United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983) (4 day delay); United States v. Johnson, 696 F.2d 115 (D.C. Cir. 1982) (5 day delay); United States v. Diana, 605 F.2d 1307 (4th Cir. 1979) (39 day delay), cert. denied, 444 U.S. 1102 (1980); United States v. Angelini, 565 F.2d 469 (7th Cir. 1977) (9-38 day delays), cert. denied, 435 U.S. 923 (1978); United States v. Diadone, 558 F.2d 775 (5th Cir. 1977) (14 day delay), cert. denied, 433 U.S. 1064 (1978); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975) (57 day delay), cert. denied, 424 U.S. 927 (1976); United States v. Cohen, 530 F.2d 43 (5th Cir. 1976) (5 week delay), cert. denied, 429 U.S. 855 (1976); United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975) (14 day delay), cert. denied, 423 U.S. 874 (1975); United States v. Falcone, 505 F.2d 478 (3rd Cir. 1974) (45 day delay), cert. denied, 420 U.S. 955 (1975).

10/ The legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 confirms that Congress meant what it said in enacting this statute. According to the report on the legislation issued by the Senate Committee on the Judiciary: "[T]he presence of the seal, noted above, is intended to be a prerequisite for use or disclosure under §2517(3) or (5) unless a satisfactory explanation can be made to the judge before whom the evidence is to be disclosed ...." S. Rep. No. 1097, 90th Cong., 2nd Sess. (1968), reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2194.

11/ In its petition at 12-14, the government argues for the first time, without citing any supporting precedent, that a delay in sealing should be treated differently than the absence of a seal under §2518(8)(a). This particular argument was not presented by the government either in the district court or the court of appeals, and it was not addressed by those courts. This Court ordinarily does not decide questions not presented below. E.g. Delta Airlines v. August, 450 U.S. 346, 362 (1981); Youakim v. Miller, 425 U.S. 231, 234 (1976). It is noteworthy that this attempt to distinguish between the absence of judicial sealing and a delay in sealing under §2518(8)(a) is the very first argument made by the government in its petition for certiorari. Since no appellate court has held that a delay in sealing should be treated any differently than the absence of a seal, the government's belated attempt to create such a distinction and to (continued...)

Third, virtually every court which has addressed the statutory sealing provision has recognized that §2518(8)(a) contains its own exclusionary rule, independent from the general provision governing motions to suppress Title III recordings on other grounds which appears at 18 U.S.C. §2518(10). E.g. United States v. Mora, 821 F.2d at 866; United States v. Diana, 605 F.2d at 1312; United States v. Gigante, 538 F.2d at 506-507. But see United States v. Falcone, 505 F.2d 478, 483-484 (3rd Cir. 1974). Thus, this Court's decisions construing §2518(10)(a) are inapposite.

Finally, every court of appeals which has addressed the issue, including the Second Circuit, has identified the integrity of late-sealed recordings as a relevant factor in adjudicating a motion to suppress late-sealed tapes. E.g. United States v. McGrath, 622 F.2d 36, 42-43 (2nd Cir. 1980); United States v. Mora, 821 F.2d at 868 (requiring government to prove by clear and convincing evidence that late-sealed tapes have not been compromised); United States v. Diana, 605 F.2d at 1314 (inquiry into integrity of the tapes deemed "appropriate in determining whether a satisfactory explanation has been provided"); United States v. Johnson, 696 F.2d at 125 (evidence of integrity "will be an important component of the Government's satisfactory explanation" in most cases). In the instant case, the court of appeals agreed with the government that the integrity of the tapes, among other factors, is relevant to determining the adequacy of the government's explanation for delay. Gov. App. 12a.

Despite this substantial area of agreement, it is undeniable that the various courts of appeals have adopted diverse approaches and emphases in applying the immediate sealing requirement. The Fifth and Seventh Circuits have declined to order suppression of late-sealed tapes where no substantial

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11/ (...continued)
suggest that it constitutes part of a conflict among the circuits should be rejected.

question about the integrity of the tapes has been raised and the purposes underlying the sealing requirement have been met. United States v. Angelini, 565 F.2d 469 (7th Cir. 1977), cert. denied, 435 U.S. 923 (1978); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975).12/ United States v. Cohen, 530 F.2d 43 (5th Cir. 1976); United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975). The Third Circuit has applied §2518(10)(a) to a delay in sealing, reaching the conclusion that said subsection does not authorize suppression of late-sealed tapes. United States v. Falcone, 505 F.2d at 483-484.

The remaining courts of appeals which have addressed this subject have applied a panoply of criteria to determine whether or not the government's explanation for late-sealed tapes should be deemed "satisfactory." If not, the late-sealed tapes are subject to exclusion. United States v. Mora, 821 F.2d at 867-869; United States v. Johnson, 696 F.2d at 124-125. Outside the Second Circuit, there have been fewer than a dozen reported appellate decisions on this subject in the twenty years since the enactment of Title III. See n.8, supra. Whatever approach was employed in those cases, the result was invariably the same: none of the late-sealed tapes was ordered suppressed in any case.

Notwithstanding the government's mischaracterization of the Second Circuit's jurisprudence in this area11/, that court's

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12/ In Angelini, which involved a 38-day delay, the court described the case as "a close one," noting that if Lawson had been decided prior to the relevant events, "[w]e might well take a different view ...." 565 F.2d at 472-473. In Lawson, defendants raised no challenge to the integrity of the tapes. 545 F.2d at 564.

11/ In a memorandum of law filed with the district court, the government described the Second Circuit's sealing decisions as "anomalous," "an aberration in the legal topography," and "draconian." Def. C. A. App. 168-171. Not surprisingly, those pejorative characterizations were omitted from the government's brief filed with the court of appeals, only to reappear in muted form in this Court. In its response to defendant's petition for certiorari in another late-sealing case, Gallagher v. United States (No. 88-7070), cert. pending, the government asserted that "[t]he Second Circuit has taken the most rigid view requiring virtually automatic suppression of unaltered tapes when the delay in sealing has been anything but minimal," citing that court's decision in the instant case. Gov. Br. in Gallagher at 9. As demonstrated herein, this hyperbole does not comport with reported caselaw.

rulings in sealing delay cases have generally been consistent with results in the other circuits. In all but two of its twelve decided cases, the Second Circuit has refused to order suppression of late-sealed tapes.14/ As the Second Circuit has observed,

> [I]n most cases when (1) the government has advanced reasons for the delay, such as the need to perform administrative tasks relating to the tapes prior to sealing, (2) there is no basis for inferring that the government sought by means of the delay to gain a tactical advantage over the defendant or that it had any other improper motive, and (3) there has been no showing that there has been tampering with the tapes or that the defendant has suffered any other prejudice as a result of the delay, the government's explanation has been accepted as satisfactory.

United States v. Rodriguez, 786 F.2d 472, 477 (2nd Cir. 1986). Thus, in the Second Circuit, as elsewhere, the government generally has had little difficulty avoiding the suppression of Title III recordings in those cases where it has failed to seal such tapes "immediately," as required by statute.15/

Even if an important conflict did exist between the decisions of the Second Circuit and those of the other courts of appeals on this subject, such a putative conflict has been rendered academic by the Second Circuit's adoption of a mandatory

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14/ Apart from the instant case, the only decision in which the Second Circuit has affirmed the suppression of late-sealed tapes was United States v. Gigante, 538 F.2d 502 (2nd Cir. 1976), where the government offered no explanation for sealing delays eight-to-twelve months in duration. That case and this one exhibit the most protracted sealing delays addressed by any appellate court since the enactment of Title III.

15/ In the present case, the affirmance of the district court's suppression order by the court of appeals did not result from any peculiar construction of §2518(8)(a), but rather from an application of that statute to the unique circumstances of this case, including a protracted sealing delay caused by the government's disregard of the sensitive nature of electronic surveillance. Since no other court of appeals has ever been confronted with such a lengthy delay in sealing, it is unclear that any appellate court would have reversed the suppression order in this case based upon the evidentiary record adduced below.

sealing procedure to be followed when electronic surveillance tapes are not immediately sealed. United States v. Massino, 784 F.2d 153, 158-159 (2nd Cir. 1986). In Massino, the court, in the exercise of its supervisory powers, established a procedure designed to create a contemporaneous record and insure judicial oversight before delays in sealing become protracted. Since all of the district courts within the Second Circuit are presumably now adhering to that court's supervisory rule, there remains no reason for this Court to expend its limited resources addressing an insignificant difference between the Second Circuit and the other courts of appeals, which has been rendered substantially moot with respect to all electronic surveillance conducted after 1986.16/

In sum, contrary to the government's representations, the application of the statutory sealing requirement does not present an intolerable conflict crying out for immediate resolution. The adjudication of late-sealing claims in the appellate courts is necessarily an ad hoc endeavor dependent upon the peculiar circumstances of each case. The issue has not proven particularly important to the administration of criminal justice. The government has managed to present its tapes for timely judicial sealing in the overwhelming majority of cases. Indeed, delays in sealing Title III recordings have generated fewer than two dozen reported appellate decisions since the enactment of the statute in 1968. Even where violations of the immediate sealing requirement have resulted in litigation, suppression of late-sealed tapes has been upheld in only two egregious instances, including the instant case. Finally, the supervisory sealing procedure promulgated by the Second Circuit in Massino has

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16/ In its petition, the government attacks the Massino procedures as "not needed." Gov. Pet. 18-19. This argument is irrelevant to the instant case since those procedures were not applied here, nor was it argued below. Significantly, the government describes the procedures outlined in Massino without making reference to the fact that those procedures were adopted in the exercise of the court's supervisory authority, rather than mandated by the court's interpretation of §2518(8)(a). Gov. Pet. 17.

effectively superceded that court's caselaw applying §2518(8)(a) with respect to all future Title III investigations.

II. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR THIS COURT TO ADDRESS THE STATUTORY SEALING REQUIREMENT.

The government's petition erroneously suggests that this case presents a clear legal issue for resolution by this Court. Indeed, even the Question Presented, as stated in the government's petition, does not accurately describe the issues addressed below. That question incorporates as a premise that the tapes at issue "are proved to be the unaltered originals." Gov. Pet. at (I). Yet, as noted above, no such findings were made in this case with respect to the suppressed, late-sealed tapes. Thus, the issue upon which the government seeks review is a hypothetical one, inapplicable to the record in this case. The absence of findings by either lower court on the issue of tape integrity renders this case particularly unsuitable for Supreme Court review.

A second factor which militates against review is the existence of several independent grounds to affirm the suppression order. These grounds, which were noted but not reviewed by the Second Circuit, include:

> the Government's alleged use of a secret recording system, its alleged deliberate destruction of tapes containing original material, and its alleged practice of eavesdropping without recording.

Gov. App. 6a. This Court has consistently held that any ground properly raised below may be urged as a basis for affirmance of the court of appeals' decision. E.g. Whitley v. Albers, 475 U.S. 312, 326 (1986). Thus, if this Court were to grant certiorari and reject the rationale of the ruling below, these other independent grounds for affirmance of the suppression order would be ripe for consideration.

Finally, the lack of any reasonable explanation for the egregious delays here further renders this case inappropriate for

review. The government's claim that the delays "did not result from carelessness, failure to give appropriate priority to the sealing requirement, or other sanctionable behavior," Gov. Pet at 20, and stemmed from "a perfectly reasonable misunderstanding," Gov. Pet. at 22, was specifically rejected by the court of appeals, which found:

> [T]he failure to seal the Levittown tapes here resulted from a disregard of the sensitive nature of the activities undertaken. The danger here is, of course, that today's dereliction becomes tomorrow's conscious avoidance of the requirements of law. The privacy and other interests affected by the electronic surveillance statutes are sufficiently important, we believe, to hold the Government to a reasonably high standard of at least acquaintance with the requirements of law.

Gov. App. 12a.

III. THIS CASE DOES NOT MERIT DISCRETIONARY REVIEW UNDER THIS COURT'S RULES.

Rule 17 of this Court's rules provides that a petition for certiorari will be granted only when there are "special and important reasons" to do so. The government has utterly failed to satisfy that stringent requirement in the instant case. The area of agreement among the appellate courts in applying the statutory sealing requirement substantially overshadows the diversity which has emerged in their respective approaches to the issue. Those insignificant differences have had no measurable impact upon the administration of criminal justice. Moreover, in the Second Circuit, the field has been essentially preempted by the supervisory promulgation of a sealing procedure to be employed in all future cases. See United States v. Massino, 784 F.2d at 158-159.

Close scrutiny of the government's petition reveals that what the government really seeks here is judicial reconsideration of the Second Circuit's determination that the government's

explanation for the protracted sealing delays in this case was unsatisfactory. In the face of a contrary finding by the court of appeals, the government continues to insist that the sealing delays in this case "did not result from carelessness, failure to give appropriate priority to the sealing requirement, or other sanctionable behavior." Gov. Pet. at 20. Reconsideration of that fact-bound issue surely does not merit the attention of this Court. See Magnum Co. v. Coty, 262 U.S. 159, 163 (1923).

Based upon its petition, the government also apparently wants this Court to rewrite that portion of §2518(8)(a) which makes the presence of a timely judicial seal or a satisfactory explanation for its absence a "prerequisite" for the use of Title III recordings in a court of law. The government would effectively amend the statute to provide that late-sealed tapes should be admitted, even in the absence of a satisfactory explanation, if the government can demonstrate that they have not been tampered with during the period of delay. Gov. Pet. at 14. Given the virtual impossibility of detecting skillful electronic editing of tape-recordings, see United States v. Johnson, 696 F.2d at 124, the legislative decision to require immediate judicial sealing as a prophylactic rule to help insure the integrity of such recordings was entirely reasonable. The sealing requirement can be readily complied with by diligent prosecutors. It has been fifteen years since this Court admonished the government to maintain "strict adherence" to the provisions of Title III. United States v. Chavez, 416 U.S. 562, 580 (1974). In any event, the government's proposal to dilute the statute should properly be addressed to Congress, not to this Court.

A separate factor which counsels against granting review in this case is that any decision on the merits is unlikely to control the future course of this long-running criminal case. If the appellate decision stands, the government will presumably proceed to trial against the defendants using its other evidence, including hundreds of non-suppressed tapes. If review were

granted and the appellate decision reversed, the case would have to be remanded to the court of appeals for resolution of independent grounds for suppression raised in the district court. See Gov. App. 6a. Such a process would further delay the trial of this indictment, which was returned on August 23, 1985.17/

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: August 8, 1989

17/ All of these defendants were arrested four years ago. Seven were detained without bail for sixteen months. They all remain subject to onerous conditions of release.

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August 8, 1989

Joseph F. Spaniol, Jr.
Clerk of the Supreme Court
of the United States
United States Supreme Court Building
Washington, DC 20543

Re: United States v. Filiberto Ojeda Rios, et al.
United States Supreme Court October Term 1989 No. 89-61

Dear Mr. Spaniol:

Enclosed for filing in the above-captioned matter please find the following:

1. Respondents' Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit;

2. Motion of Respondents Ivonne Melendez Carrion, Isaac Camacho Negron, Elias Castro Ramos, and Hilton Fernandez Diamante to Proceed In Forma Pauperis; and

3. Certificate of Service.

I am enclosing the original along with nine copies of these documents in accordance with the Court's rules respecting in forma pauperis filings.

I am also enclosing herewith for filing my Entry of Appearance as counsel of record to Ivonne Melendez Carrion in this matter. Thank you for your assistance.

Sincerely yours,

James L. Sultan

JLS:pcb

Enclosures

FEDERAL EXPRESS AIRBILL #8372448162

cc: Kenneth W. Starr, Solicitor General of the United States
Counsel for all co-respondents

NO. 89-61 (9)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

-vs-

FILIBERTO OJEDA RIOS, ET AL., RESPONDENTS

RESPONDENTS' OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Second Circuit Court of Appeals erred in affirming the suppression of certain tape recorded fruits of electronic surveillance pursuant to 18 U.S.C. Sec.2518(8)(a), where the government delayed judicial sealing said tapes for at least 82 days and failed to provide a satisfactory explanation for such delay, and where the record further showed the government's use of inadequate custodial procedures, a secret cassette recording system, intentional destruction of original surveillance tapes, a pervasive practice of "live-monitoring," and perjury by government agents.

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STATEMENT OF THE CASE

During the course of a massive 17-month electronic surveillance investigation in Puerto Rico, government agents recorded 1,011 reels and cassettes which were eventually judicially sealed. The operation was conducted between April 27, 1984, and August 30, 1985 at various locations on the island. Gov. App. 18a. The surveillance included microphones placed in private residences and offices, wiretaps of private and public telephones, and a bug placed inside a private automobile.

The initial Title III order, entered on April 27, 1984, authorized interception and recording of oral communications at the residence of Filiberto Ojeda Rios in Levittown, Puerto Rico, and wiretapping of several public telephones across the street from the residence. Gov. App. 3a. That order was extended twice. The final extension expired July 23, 1984. The tapes obtained from the Levittown surveillance were judicially sealed on October 13, 1984, 82 days after the expiration of the final extension order and 96 days after the surveillance actually ceased. Gov. App. 4a.

Among the other surveillance sites were two public telephones in Vega Baja, Puerto Rico. A Title III order authorizing the wiretap of those telephones was issued January 18, 1985. It expired February 17, 1985. The government obtained a new order for those same telephones on March 1, 1985. It was extended twice, and finally expired May 30, 1985. All tapes from the Vega Baja pay telephone wiretaps were sealed June 15, 1985, 118 days after the expiration of the January 18, 1985, order. Gov. App. 5a.

During three years of pre-trial proceedings, the sixteen defendants moved to suppress the fruits of the electronic surveillance for numerous government violations of

the law, including: (1) violation of the statutory sealing requirement, 18 U.S.C. Sec. 2518(8)(a); (2) use of a secret cassette recording system; (3) intentional destruction of original surveillance tapes; (4) pervasive use of the practice of "live-monitoring"; and (5) perjury by government agents. Def. C.A. App. 1, 10, 17.

On July 7, 1988, the district court issued a ruling suppressing all tapes from the Levittown residence and public phones and those tapes from the Vega Baja public phones which were obtained pursuant to the January 18, 1985, order. In both instances, the court ordered suppression because of the government's failure to comply with the statutory sealing requirement. Gov. App. 66a, 83a.

The Court of Appeals for the Second Circuit, ruling on the government's interlocutory appeal, affirmed the suppression of the Levittown and Vega Baja tapes. Gov. App. 11a. The court of appeals examined whether the government had provided the statutorily-required "satisfactory explanation" for each delay. It held that neither the eighty-two or ninety-six day delay with respect to the Levittown tapes nor the 118-day delay in sealing the Vega Baja telephone tapes was satisfactorily explained and upheld the supression of both sets of tapes for that reason. Gov. App. 13a, 14a.

SUMMARY OF REASONS FOR DENYING THE PETITION

In addition to the reasoning adopted by the Court of Appeals for the Second Circuit for affirming suppression of the Levittown tapes and Vega Baja telephone tapes for failure of the government to supply a "satisfactory explanation" for the late sealing of those tapes, "any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision." Whitley v. Albers, 106 S. Ct. 1078, 1088 (1986). Numerous such reasons were raised by the respondents both in the district court and in the court of appeals, including the failure of the government to to establish the integrity of the tapes, the independent grounds for suppression based upon the government's use of a secret recording system which created "bootleg cassettes" and the government's practice of listening without recording conversations in violation of Title III's stringent requirements, and perjury by government agents.

The factually complex record underlying these independent grounds for suppression makes this an inappropriate case for review on certiorari because the legal issues are intricately fact-bound and tied to the procedures involved in this particular investigation.

REASONS FOR DENYING THE PETITION

Respondents ANGEL DIAZ-RUIZ, ORLANDO GONZALEZ CLAUDIO, FILIBERTO OJEDA RIOS, AND JORGE FARINACCI GARCIA fully adopt the reasons for denying the petition contained in the brief in opposition to certiorari submitted by co-defendants Yvonne Melendez-Carrion, Isaac Camacho Negron, Elias Castro Ramos and Hilton Fernandez Diamante. In addition, they point out that if this Court grants certiorari and rejects the rationale of the court of appeals, it will become necessary for the Court to examine the alternative grounds for suppression of the tapes, all of which were which argued by the respondents both in the district court and on appeal. "Any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision." Whitley v. Albers, 106 S. Ct. 1078, 1088 (1986), citing United States v. New York Telephone Co., 434 U.S. 159, 166 (1977). The alternative grounds for suppression raised below are addressed in the following pages.

I. THE GOVERNMENT HAS NOT ESTABLISHED THE INTEGRITY OF THE TAPES

The district court, which suppressed the tapes for violation of the immediate sealing requirement under Section 2518(8)(a), found it unnecessary to decide whether or not the government had satisfied its heavy evidentiary burden of establishing the integrity of tapes which had been suppressed. The court explicitly refused to consider that issue, stating that "...because the Court has suppressed the Levittown residence and payphone tapes due to the excessive delay in sealing, these tapes are not considered in the instant analysis of the integrity of the tapes." Gov. App. 30a, n.3. The court declined to reconsider that footnote when urged to do so by a government motion for "clarification

and reconsideration." Def. C.A. App. 120. The court of appeals, in affirming the district court ruling, similarly avoided the factual issue of the integrity of the suppressed tapes.

However, the court of appeals noted that "Our decisions have fully recognized the importance of the integrity of the underlying tape, an importance that in an era of increasingly sophisticated techniques cannot be overemphasized." Gov. App. 6a-7a. The court of appeals cited this Court's decision in United States v. Giordano, 416 U.S. 505, 527 (1974) and emphasized that "the technological advances that have occurred in the fifteen years since the Giordano decision, see G. Marx, Undercover: Police Surveillance in America 206-33 (1988)...render the Court's view in that case all the more pertinent." Gov. App. 3a.

The significance of the government's proving integrity of the tapes was addressed at length in United States v. Gigante, 538 F.2d 502, 505 (2d Cir. 1976), where the government conceded that tapes had not been judicially sealed for periods ranging from eight to twelve months, but claimed that suppression was not warranted because the defendants had been unable to present evidence of actual tampering:

> "To demand such an evidentiary showing, however, would vitiate the Congressional purpose in requiring judicial supervision of the sealing process. Tape recorded evidence is uniquely susceptible to manipulation and alteration. Portions of a conversation may be deleted, substituted, or rearranged. Yet, if the editing is skillful, such modifications can rarely, if ever, be detected. The judicial sealing requirement, therefore, provides an external safeguard against tampering with or manipulation of recorded evidence. The sealed tapes become 'confidential court records' and cannot be unsealed in the absence of a subsequent order. When these safeguards are compared with the haphazard procedures employed in this case, the wisdom of Congress becomes manifest." 538 F.2d 502, 505.

The extensive record in this case fully demonstrates the government's failure to meet its burden on the integrity of the suppressed tapes. The district court held ten (10) months of hearings, from September 1, 1987, through June, 1988, on Title III issues in this case. Testimony was taken from agents and civilian employees of the FBI, from technical experts, and from lay witnesses regarding the creation, handling, labeling, storage, and eventual sealing of the tapes created. The testimony revealed that procedures used by the agents seriously violated the safeguards provided by statute. The record indicates that serious flaws in the government's custody procedures prior to sealing routinely provided opportunities for tampering. Testimony about anomalies on the suppressed tapes was presented by the respondents which suggested that such tampering actually occurred. This evidence, which relates directly to the integrity of the tapes, was not considered by the district court when suppression was ordered.

A. Inadequate Custodial Procedures Created Widespread Opportunities for Tampering by the FBI

Many circuit courts of appeals have recognized that proper handling and securing of Title III recordings are essential to minimize opportunities for tampering prior to judicial sealing, e.g. United States v. Mora, 821 F.2d 860, 869 (1st Cir. 1987), United States v. Rodriguez, 786 F.2d 472, 478 (2nd Cir. 1986), and United States v. Johnson, 696 F.2d 115, 125 (D.C. Cir. 1982). In this case, the government failed to establish procedures adequate for the prevention of tampering, and then failed to follow even those inadequate policies which had been adopted. The lack of adequate procedures necessarily undermined the integrity of the tapes.

In marked contrast to procedures followed in Mora and

Rodriguez, in which tapes were placed in heat-sealed envelopes at the monitoring sites immediately after being recorded, the monitoring agents in this case were specifically instructed not to seal the "504 envelopes" which served as containers for the recorded tapes. Rec. 10/9/87 Tr. 223-224; Gov. Exh. 375A, p. 4. Often a number of days passed before the envelopes were informally sealed by the electronic surveillance ("ELSUR") Clerk. Thus, anyone in the FBI with access to a 504 envelope who chose to remove the tape and alter it prior to sealing by the ELSUR Clerk was free to do so.

Even after informal "sealing" by the ELSUR Clerk, original reels were removed from their 504 envelopes without any documentation of that fact. The ELSUR room log indicated that unidentified tapes had been taken from that location prior to judicial sealing with no explanation or documentation provided. Such unwarranted and undocumented removal of tapes before the long-delayed judicial sealing provided substantial and needless opportunities for government tampering.

The unreliability of the custody procedures was demonstrated during the suppression hearings when a 504 evidence envelope was opened which purportedly contained original reel #52 recorded at Levittown telephone 784-9625. It actually contained a cassette tape, not a reel. Neither the monitoring agent nor any other government official had any explanation. D. App. 232-249. 1/

Finally, the chain-of-custody documents introduced in evidence contained anomalies casting considerable doubt on the accuracy and reliability of those records as a whole. Dates were inaccurately specified, agents not clearly identified, and in certain instances documentation appeared to have been non-contemporaneously created, in violation of

the FBI's own procedures.

B. The Physical Characteristics of the Tapes Raise Doubts About Their Relisbility and Authenticity

During the suppression hearings, the respondents presented evidence of tape anomalies which undermine the claimed integrity of the suppressed tapes. Among other evidence, was the unrefuted testimony that many of the so-called "duplicate original" 2/ tapes contained undocumented stop/start events. These appeared to be instances in which recording was stopped and then re-started without any corresponding notation on the FBI monitoring logs. 3/ The government's own expert, Ernest Aschkenasy, agreed that such undocumented stop/start marks are signs suggestive of falsification. Rec. 5/4/88 Tr. 167. While Aschkenasy speculated about possible innocent explanations for the presence of such marks, the record is barren of support for any such explanation. It is noteworhy that Mr. Aschkenasy never disputed the fact that stop/start marks were found on the tapes and never testified that tampering had not occurred.

Evidence introduced at the hearings raised significant questions regarding the originality of the suppressed recordings. Mr. Aschkenasy examined only ten "original" tapes, of which five were suppressed Levittown or Vega Baja tapes. As Aschkenasy himself acknowledged, findings regarding originality could not properly be extrapolated to any tapes which had not been examined. D. App. 254-257. Yet, the district court erroneously used the limited findings from the ten "original" tapes to draw conclusions about the originality of the non-suppressed tapes as a whole.

Problems of integrity of the Levittown tapes were demonstrated by evidence regarding Reels #6 and #7 which were

recorded in the Levittown residence. The evidence from an inadvertantly retained bootleg cassette, see infra Sec. II.A, established that there was a gap of only 1.27 seconds between the conversation recorded at the end of Reel #6 and the continuation of that conversation at the start of Reel #7. Earlier testimony had established that it was physically impossible to change reels of tape within that limited time period. Rec. 12/2/87 Tr. 93-96. Thus, the contents of the two reels strongly suggested editing or alteration of the "original" Reel #7, possibly involving recordation of material from a bootleg cassette onto Reel #7.

Unable to explain the incongruous evidence, the government offered hypothetical explanations, including that of a supervisory special agent who testified that the brief gap between Reels #6 and #7 could be explained as follows: If no "duplicate original" was made of Reel #6 or was removed from the machine prior to recording, then a new tape ("original" Reel #7) could have been placed on the duplicate machine and activated as soon as Reel #6 ran out. The witness conceded that this speculative theory was inconsistent with his recollection and his own prior testimony, as well as the testimony of all other monitors who testified about these tapes. Rec. 3/1/88 Tr. 143-160.

The government's explanation, if believed, raised additional difficult questions because the government claimed that a tape which had been labelled and preserved as a "duplicate original" was actually a copy. That copy would necessarily have been created at a subsequent unknown time and place, by an unknown person who then mislabelled it as a "duplicate original." However, there was no documentation of any kind that "original" Reel #7 was ever copied. See D. App. 296. Despite these problems, the government made no effort to have its expert test either "original" or

"duplicate original" Reels #6 and #7. Given the absence of government proof, the record utterly fails to establish the "pristinity" of the tapes. 4/

In the district court, the respondents moved to suppress all 1,011 reels of tape and cassettes generated in Puerto Rico during the course of the investigation. However, because the government chose to designate only 166 recordings as "relevant" to its proof in its case-in-chief, the court's ruling applied only to those 166 so-called "relevant" tapes. Thus, the tapes to which the district court's ruling applied constituted only sixteen (16%) per cent of the total generated by the FBI. 5/ This approach wholly avoided consideration of procedures used by the FBI and evidence of tampering which may have existed on so-called "non-relevant tapes." In fact, it permitted government agents and prosecutors to shield from court examination any tapes which were known or suspected of having been altered, editted or otherwise subjects of tampering, simply by designating such tapes as "non-relevant." The respondents were denied the opportunity to show that defects demonstrated by the "non-relevant tapes" compromised the electronic surveillance operation, ignored Title III requirements, and violated the respondents' rights.

In the event that this Court should order a remand, this Court must provide guidance to the lower court in the following areas: (1) whether First or Second Circuit law should be applied; (2) whether the respondents are entitled to examine all of the so-called "original" tapes and/or all of the suppressed tapes to evaluate their overall integrity; (3) whether these indigent respondents are entitled to retain an expert to rebut the Electronic Tape Scanning ("E.T.S.) evidence offered by the government; and (4) whether the respondents are entitled to cross-examine all government

agents who filed affidavits which were relied upon by the district court.

II. THERE ARE TWO INDEPENDENT GROUNDS FOR SUPPRESSING THE TAPES AT ISSUE ON APPEAL

Apart from the government's violation of the statutory sealing requirement, respondents raised two additional grounds below for suppressing the Title III recordings, including the Levittown and Vega Baja tapes at issue in this petition. First, respondents claimed that the government's conduct in employing a supplemental, secret recording system and then deliberately destroying most of the "bootleg cassettes" 6/ created thereby, warranted suppression of all the tapes. Second, respondents asserted that the government's pervasive practice of "live-monitoring" by eavesdropping without recording, in clear violation of Title III requirements, mandated suppression of the electronic surveillance as a whole. Following evidentiary hearings both motions were denied by the district court. D. App. 49-119. The Second Circuit never reached these issues.

If this Court affirms the Second Circuit Court of Appeals decision upholding the district court's suppression order based upon the government's failure to seal the Levittown and Vega Baja recordings in accordance with the requirements of Sec. 2518(8)(a), the two alternative grounds for suppression asserted by respondents need not be reached by this Court. Assuming arguendo, however, that the Court reverses and vacates the suppression order, the merits of the additional claims must be addressed. Whitley v. Albers, supra. As demonstrated, infra, the district court erred in rejecting these additional grounds for suppressing the subject tapes.

A. The Government's Use of a Secret Recording System and Its Deliberate Destruction of Resulting Tapes Containing Original Material Warrant Suppression.

In addition to the two reel-to-reel tape recorders described by the government in its pretrial disclosures, the FBI utilized a third recording system at each location monitored. The supplemental system used independently operated and separately wired cassette recorders. It could and did record conversations which did not appear on any of the corresponding "original" or "duplicate original" reel-to-reel tapes. 7/ The existence of the separate recording system was deliberately concealed by the government for two years after the arrests of the defendants. 8/

Unlike the reel-to-reel recordings, which were preserved, labelled, and eventually judicially sealed, most of the cassette recordings were intentionally destroyed by the FBI, either by re-using them, or by putting them through a bulk eraser. D. App. 49-52. 9/ The FBI inadvertantly retained a small number of the cassette recordings. They were finally disclosed to the defense over a period of months during the Title III hearings.

The government's claim that the cassette recorders were simply used to make "work copy" cassettes, i.e. additional copies of the material recorded on the reel-to-reels for use by the monitors and supervisory agents, is belied by the record. Of the 39 cassettes which were not destroyed, four correspond to residence (as opposed to telephone) intercepts. 10/ All of those residence cassettes contain additional "bootleg" material that does not appear anywhere on the corresponding "original" or "duplicate original" reel-to-reel tapes. Record, Gov. Exh. 379d, f, g; 439a. 11/ Although FBI monitoring agents testified that, under the procedures which were followed, it would have been impossible

for the cassettes to record additional original conversations which did not appear on the reel-to-reels, it is striking that one hundred percent (100%) of the retained residence bootleg cassettes did contain such original materials, none of which were ever judicially sealed. Applying the logic of the district court, which readily extrapolated from the contents of the 10 "original" tapes to that of the unexamined originals, supra at 13 would have raised grave concerns about the likelihood of original conversations on bootleg cassettes which had been destroyed. Curiously, the district court refused to extrapolate from the tainted residence bootleg cassettes to the likely contents of those bootlegs which had been destroyed by the government agents.

As the district court ruled, there is no way to determine how many other bootleg cassettes contained original material not appearing on any sealed reel-to-reel recording since virtually all of the cassettes have been deliberately destroyed. D. App. 62-63. The district court stated that the government should have preserved all of the cassettes and disclosed their existence to respondents during the early stages of pre-trial discovery. Yet the court refused to suppress the tapes or impose sanctions of any kind upon the government.

The government's egregious misconduct in generating and deliberately destroying bootleg cassettes containing the fruits of electronic eavesdropping warrants suppression of the recordings at issue on two distinct grounds. First, the inadvertently-retained bootleg cassettes establish that an unknown number of recorded original electronic interceptions from the Levittown residence were not judicially sealed or preserved in any way. The district court erroneously denied this claim on the ground that the cassettes themselves were not designated by the government as "original" evidence.

Ruling, Gov. App. 7. Yet the government is not free to pick and choose which original recordings it will submit for judicial sealing. Title III mandates the preservation and sealing of all original recordings. 18 U.S.C. Sec.2118(8)(a). Thus, there is no question that the bootleg cassette operation violated the strict preservation and sealing requirement of the statute.

The government's deliberate destruction of its bootleg cassettes severely undercut the respondents' ability to establish tampering and listening without recording. Moreover, it prevented them from challenging the government's adherence to the minimization requirement of Title III. The government impermissibly limited respondents' ability to litigate these important claims and to cross-examine the monitoring agents who created the bootleg tapes. See United States v. Huss, 482 F.2d 38, 47-48 (2nd Cir. 1973).

The district court's ruling is based in large part upon its erroneous characterization of the government's misconduct as involving the "inadvertent" loss of evidence. D. App 67-68. See United States v. Bufalino, 576 F. 2d 446, 450 (2nd Cir. 1978). This conclusion was predicated upon the court's reliance upon self-serving affidavits belatedly filed by the 67 monitoring agents. D. App. 55-56, 63-64. The lower court chose to over-look the government's intentional use of a secret, independent cassette recording system and its failure to take rudimentary steps to preserve the recordings created by that system. The claim that some of the monitoring agents were unaware of the specific contents of the cassettes which were intentionally destroyed, cannot transform the government's practice into a "good faith" loss of evidence.

The court also erred in relying upon affidavits of agents never subjected to cross-examination. 12/ The district court gave substantial weight to those affidavits,

D. App. 55-56, 63-64, aggravating the prejudice resulting from the denial of the Sixth Amendment right to confrontation. Should this Court find it necessary to reach the issue of the bootleg cassettes, the district court's suppression order should be affirmed on that independent ground.

B. The Government's Demonstrated Practice of Eavesdropping Without Recording Violated Title III And Justifies Suppression of the Subject Tapes

Title III requires that the contents of all intercepted communications "...shall, if possible, be recorded on tape or wire or other comparable device." 18 U.S.C. Sec. 2518(8)(a). Respondents introduced substantial evidence that monitoring agents in this case engaged in a widespread practice of listening without recording, in contravention of the Fourth Amendment, the statute, court orders, and applicable FBI instructions. Despite the testimony of two agents who admitted on the witness stand that they listened without recording, the district court rejected the bulk of respondents' proof and denied their motion to suppress based on this independent ground.

Central to the respondents' proof of live monitoring was extensive evidence of simultaneous matching of television and radio stations carried out by the monitoring agents at each site. A radio and television were connected to a reel-to-reel recorder at each monitoring location to enable the agents to attempt to determine which radio or television station was being played in the target location. Once the agents matched their station with that being overheard, background noise could be filtered out. D. App. 72-79. Monitors were instructed to attempt to match radio and television transmissions each time the recorders were turned on. D. App. 79-80.

Respondents presented proof which established that on numerous occasions, monitors managed to match stations before initiating a spot check. Thus, even though the television channel or radio station within the target residence had been changed since the prior spot check, during a period when agents claimed not to have been listening at all, the agents were miraculously able to select the same station as that of their targets. The respondents' proof of was presented through cross-examination of monitoring agents, the government's own Title III logs, and charts prepared by defendants and paralegals.

For example on fifty (50) tapes exhaustively analyzed by the respondents, it was found that there were six hundred seventeen (617) recorded intercepts in which the sound of a television or radio was heard both in the surveilled premises and on the FBI channel used by the monitoring agents. Forty-eight (48) of those intercepts were from the Levittown residence tapes here at issue. Of those forty-eight (48) interceptions, the FBI agents managed to perfectly match the residence stations at the very beginning of each intercept, representing one hundred percent (100%) matching. It is particularly striking that twenty-three (23) of the intercepts which were perfectly matched involved channel changes since the previous overhears. Def. Exh. 2387A.

Of the thousands of entries on the charts, most of the data was derived from log entries made by FBI agents who indicated which television stations were being used. Several agents admitted such prescient matches, often involving three or more channel changes. No cogent explanation was ever offered by the government. 13/

In rejecting the respondents' claims of live monitoring, the district court utterly failed to consider the voluminous proof presented. Rather, the court dismissed the detailed

charts introduced into evidence because they had been prepared by members of the defense team and contained a small number of factual inaccuracies. 14/ The district court ruled that any violations of the recording provsisions were de minimis and did not require suppression. This approach ignored the fact that the recording requirement is central to the enforcement of Title III. United States v. Giordano, supra, at 528. It is the preservation of intercepted conversations which enables reviewing courts to scrutinize the government's conduct of electronic surveillance. Without such recordings, for example, a court cannot properly evaluate the government's compliance with the minimization requirements of Title III. United States v. Abascal, 564 F.2d 821, 827 n.2 (9th Cir. 1977).

Listening without recording, as demonstrated by the evidentiary record in the instant case, transforms court-authorized electronic surveillance into an unconstitutional general search. The widespread violations of the recording requirement which occurred here warrant suppression of the fruits of the government's electronic surveillance. Should the Court find it necessary to reach this issue, the district court's suppression of these tapes should be upheld on this independent ground.

III. PERJURY BY GOVERNMENT AGENTS

On October 20, 1986, during the suppression hearings, the government solicited affidavits from the electronic surveillance monitoring agents by means of an airtel which informed the agents that "the defense has accused the FBI of illegal arrests, illegal searches, the 'planting' and fabrication of evidence, and illegally intercepting conversations of the defendants, including the monitoring of conversations without recording, tampering of tapes and the erasure of portions of audio tapes." The airtel urged the agents to create a "basis to deny the defense motion to subpoenaing every agent." (Def. Exh. 2385) Most of the monitoring agents submitted the requested affidavits.

The affidavits provided by the agents contained false or inaccurate assertions that the agents "did not alter, erase, change or tamper with any tape in my possession or control." The majority of agents admitted to routinely creating and destroying bootleg cassettes. Particularly striking was the testimony of agents Tyler Morgan and Abelardo Alba.

Agent Tyler Morgan signed the draft affidavit attached to the October 20, 1986 airtel and had it notarized, but then crossed out his name and the name of the notary because he knew it was false to say that "I followed the procedure requiring that any conversation monitored be also recorded" or that "When I monitored any communication...recording equipment was activated simultaneously to record what was monitored." Rec.12/4/87 Tr. 63-64. Agent Morgan testified that he completed the affidavit which he later defaced even though he knew that both he and Agent Abelardo Alba had live-monitored in violation of court orders. Rec. 12/8/87 Tr. 91-92. Agent Morgan further testified that he observed Agent Alba live-monitoring at the Vega Baja listening post, that

he knew live-monitoring was against court orders but that he did not report Alba's actions to any superior or to any government attorney. Rec. 12/9/87 Tr. 74. Morgan did not report the live-monitoring because he "...thought it would not come up" and did not think of it as a violation of law to submit false logs. Rec. 12/6/87 Tr. 82, 84. Agent Alba confirmed Morgan's testimony, admitting in his affidavit dated March 16, 1987, that he listened without recording. (Def. Exh. 2384-JJJ).

Significantly, Agent Morgan testified that he believed agents in addition to Agent Alba were live-monitoring as well. Thus, he testified that he would not have live-monitored " without believing that this was the method that others were using to monitor." Rec. 12/9/87 Tr. 54.

CONCLUSION

As discussed above, lack of adequate custodial procedures which created opportunities for tampering, existence of physical characteristics of the tapes which raise doubts about authenticity, use of a secret recording system and subsequent destruction of the bootleg cassettes which it generated, listening without recording and admitted perjury by government agents, all bring into question the legitimacy of these tapes. These factors constiutute independent grounds which justify sustaining the suppression of the tapes. The existence of all of these fact-bound issues makes this case one which does not present a clear cut vehicle for decision.

WHEREFORE, the petition for a writ of certiorari should be denied.

DATED: August 11, 1989 Respectfully submitted,

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ENDNOTES

1/ Further evidence of the unreliability of the government's handling of original tapes was provided during the trial of five co-defendants of these respondents, which occurred during the pendency of the Second Circuit appeal on this matter. Special Agent Trace Kirk testified on February 14, 1989, that he removed original evidence tapes from the Elsur room vault "five or six times" over a period of a year. Each time, he gave the tape to an FBI language specialist who had been having diffulty making transcriptions from the corresponding duplicate original tape. Agent Kirk testified that there was no written documentation concerning the removal of the original tapes, names of language specialists were not listed on the chain-of-custody envelopes, he didn't know how long specialists kept the tapes, or what they did with them. 2/14/89 Tr. 114, 117. He also testified that he might have removed original tapes from the Elsur room without signing them out. Id. at 118.

2/ The equipment at each electronic surveillance location, except for the Datsun Sentra automobile, was set up so that two reel-to-reel recordings were made simultaneously with the intercept of any communication; one of the recordings was to be labeled "original" and the other "duplicate original."

3/ It was undisputed that undocumented stop/starts appeared on at least 22 of the Levittown residence "duplicate original" reels. For example, Levittown residence Reel #46 indicates that the tape recorder was turned off and on again 7 times, yet expert analysis revealed 23 separate stop/start episodes on that tapes. Rec. 3/28/88 Tr. 24; see also Rec. Vol, XXI, D. Exh. 2591.

4/ The chain-of-custody documents for Levittown Reels #6 and #7 are also problematic. While the ELSUR Clerk's initials and date were usually placed on the ELSUR evidence tape on the 504 envelopes, no date appears on the "ELSUR seal" for Reel #6. Although both were recorded on May 15, 1984, Reel #7 was kept overnight by a supervisor, delivered the next morning, and not sealed by the ELSUR Clerk until May 21, 1984, five days later. See D. App. 296.

5/ "...the Court's review shall be limited to the evidence tapes, those tapes which the government has designated for possible use in its case-in-chief." Gov. App 30a, fn. 3.

6/ The term "bootleg cassettes," used to describe cassette recordings created outside the parameters of Title III and not judicially authorized or sealed, is derived from the Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (Minority Report) (1976), p.182.

7/ Special Agent Monserrate, the FBI technical agent who set up the equipment, testified that the cassette recorders, separately wired to the listening devices, could record conversations even when the reel-to-reel machinery was off or "minimized," as long as the "tape/input" switch on the

reel-to-reels was in the "input" position. Rec. 10/20/87, Tr. 232.

8/ On September 1, 1987, the first day of the Title III hearings, Case Agent Jose Rodriquez admitted that the government's widespread use of cassette recorders, ostensibly to make "work cassettes," had not been revealed previously "to keep questions from being asked about it." D. App. 275. Despite numerous defense discovery requests, beginning in November, 1985, for specific information about the recording equipment employed, the government never disclosed the use of the cassette recorders to make so-called "work cassettes" prior to Agent Rodriquez's testimony. In fact, a draft response prepared by the technical agent in October, 1986, had included that information. See, Record, XVIII, Def. Exh. 2411.

9/ The government did preserve and seal a small number of cassettes, denominated "A tapes," which were made to bridge gaps in conversations while the reels were being changed. Those tapes are not at issue here.

10/ The bootleg cassettes that correspond to telephone interceptions essentially match the corresponding reels. This is not surprising since telephone intercepts, unlike residential intercepts, were rarely minimized.

11/ In addition, two of the sealed "A tapes" for the Levittown residence had previously been used as bootleg cassettes. They too contain additional conversations not recorded on the corresponding reels. D. App. 49-62.

12/ The court arbitrarily allowed defendants to examine only 20 of the 67 Title III monitoring agents. The government introduced conclusory affidavits executed by all 67 of the monitors stating that they never "knowingly" recorded anything on the so-called work cassettes not appearing on the reel-to-reel tapes. See e.g. D. App. 301-302. The court relied heavily on those affidavits in reaching its legal conclusion that the loss of evidence was "inadvertent" and in "good faith." D. App. 67.

13/ A single example of the proof in the record below established the nature of the claim and the government's misconduct. Agent Luis Rivera was a monitor for Vega Baja residence Reel #192 on April 10, 1985. During a two-hour period, he conducted eight spot checks. The television was on a different channel from the preceding spot check each time. Despite the channel changes, he was able to match the FBI's television to the station playing in the target residence at the very moment each spot check commenced. D. App. 303-309; see also D. Exh. 2546. He admitted the matches and gave two possible explanations: (1) "coincidence" and (2) use of a "light meter" on the power amplifier. Rec. 2/4/88, Tr. 160-161; 2/5/88, Tr. 143. The latter theory was unique to Agent Rivera, unsubstantiated by the government, and entirely incredible. The court below refused to permit any test to be made of Agent Rivera's theory and then ignored Mr. Rivera's admissions of simultaneous matching, as well as his light meter theory.

14/ The prosecution identified fewer than ten of 991 instances identified by the defendants in which the defendants' claim of simultaneous matching was open to dispute. Moreover, the district court effectively prevented these indigent defendants from presenting their claim by

denying their request for funds to retain an expert to establish the statistical significance of the occurrences of simulataneous matching shown by the evidence. D. App. 286-293. The court's refusal to enable the defendants to present their case violated their constitutional rights to due process and equal protection. See p. 55, n. 48, supra.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the following parties have been served copies of the foregoing by mail this 11th day of August, 1989:

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MARGARET P. LEVY

(3)

No. 89-61

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-61

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondents acknowledge the conflict among the circuits on the issue presented in this case. Melendez Carrion Br. in Opp. 10 ("it is undeniable that the various courts of appeals have adopted diverse approaches and emphases in applying the immediate sealing requirement").[1] They argue, however, that resolution of the conflict is unwarranted for several reasons.

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[1] There are nine respondents in this case. Respondents Ivonne Melendez Carrion, Isaac Camacho Negron, Elias Castro Ramos, and Hilton Fernandez Diamante filed a consolidated opposition that will be referred to as "Melendez Carrion Br. in Opp." Respondents Angel Diaz Ruiz, Orlando Gonzales Claudio, Filiberto Ojeda Rios, and Jorge Farinacci Garcia filed a separate consolidated opposition that will be referred to as "Diaz Ruiz Br. in Opp." Respondent Luis A. Colon Osorio has not responded to our petition.

1. Respondents note that the issue presented here has been the subject of "only" 22 reported court of appeals decisions. That, however, is a considerable number of appellate decisions on a single issue; rather than supporting respondents' point, the number of decided cases indicates that the issue arises with sufficient frequency to warrant this Court's attention. Moreover, while the courts of appeals have only twice ordered the suppression of wiretap evidence on this basis,[2] the disagreement among the appellate courts over the proper standard to apply has been a source of extended litigation in district courts.[3] The fact that most courts have declined to suppress evidence on the theory adopted by the courts below reflects that the Second Circuit's view of the issue is a distinct minority position, but it does not suggest that the issue is unimportant. If the Second Circuit is correct, as respondents claim, electronic surveillance evidence presumably should have been suppressed in many of the cases in which it was admitted. Finally, the need for resolution of the conflict among the circuits is especially great in this area, because electronic surveillance is ordinarily conducted only in the most im-

[2] In addition to the instant case, the court suppressed evidence in *United States* v. *Gigante,* 538 F.2d 502 (2d Cir. 1976).

[3] Respondents assert that the conflict among the circuits is now an insignificant one, since the Second Circuit has adopted a procedure requiring that the government ordinarily seal recordings within two days, that it provide a contemporaneous explanation when the delay in sealing is between two and five days, and that it obtain an extension order from the court if the delay is to be more than five days. See *United States* v. *Massino*, 784 F.2d 153, 158-159 (1986). The *Massino* decision does not render the conflict less important, however, because it did not affect the Second Circuit's commitment to the use of suppression in cases involving unexplained delays, even when the recordings are shown to be unaltered.

portant criminal investigations. See 18 U.S.C. 2516(1). In this case, for example, if the suppression order is upheld the government may not be able to succeed in its prosecution of respondents for their role in a $7.2 million robbery.

2. Respondents suggest (Melendez Carrion Br. in Opp. 14; Diaz Ruiz Br. in Opp. 4-11) that this is not an appropriate case in which to resolve the circuit conflict because the district court made no finding as to the integrity of the Levittown tapes. But that is beside the point. Both courts below held that the Levittown tapes must be suppressed regardless of whether they have been altered. For that reason, the district court and the court of appeals held that there was no need to make a factual finding on that issue. Under the Second Circuit's rule, the evidence would have been suppressed even if the district court had found conclusively that the tapes had not been altered. See Pet. App. 12a-13a, 66a, 83a. It is that holding by the court of appeals that places this case in sharp conflict with the decisions of other circuits holding that the evidence must be admitted if the evidence shows that the integrity of the tapes has been preserved.[4]

[4] Respondents suggest (Melendez Carrion Br. in Opp. 15) that the government's position is based on a factual premise and that the premise is inconsistent with the court of appeals' statement that the delay in sealing "resulted from a disregard of the sensitive nature of the activities undertaken" (Pet. App. 12a). In the first place, however, that characterization of the government's default is not a factual finding. The district court found that the delay in sealing the tapes was the result of the supervising attorney's misunderstanding of the sealing requirement (Pet. App. 76a-77a), and we have not challenged that finding (see Pet. 18 n.13). Furthermore, the resolution of this case does not turn on the correctness of the court of appeals' conclusion that the supervising attorney was negligent. The court of appeals concluded that the supervising attorney was at fault because the government should be held to "a reasonably high standard of at least acquaintance with the requirements of law." Pet. App. 12a. While we

In any event, the district court specifically found that all the other tapes the government wished to introduce were unaltered, including the suppressed Vega Baja tapes. Pet. App. 29a-61a. It based those findings in part on the testimony of experts who had examined and tested 10 original tapes. Significantly, five of the 10 tapes chosen by respondents for expert analysis were recorded at Levittown. Gov't C.A. App. 161-162. Furthermore, the same chain of custody procedures were used for all the tapes, and the district court found that the testimony of the agents who participated in the Title III investigation established "that there were no unauthorized persons with access to the tapes, and that there was no tampering, deletions or additions to the tapes." Pet. App. 45a. Consequently, with respect to the suppressed Vega Baja tapes, all the factual findings necessary to their admissibility have already been made. With respect to the Levittown tapes, the district court will have to make the necessary finding on remand from this Court should the government prevail. But because most of the evidence presented at the suppression hearing regarding the integrity of the Levittown tapes and all other tapes is identical, and the district court has already found that the other tapes have not been altered, there is no reason to expect that a different result will be reached with respect to the Levittown tapes.

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believe that the supervising attorney's error was understandable in light of the state of the law at the time (see Pet. 20-21 & n.14), it is our position that suppression is inappropriate regardless of whether the supervising attorney was negligent, as long as the integrity of the tapes has been maintained.

3. Respondents complain (Melendez Carrion Br. in Opp. 16-17) that substantial pretrial delay will result if the government's petition is granted, and they hint that the government will be able to try its case without their suppressed conversations. But the government certified to the district court that its appeal was not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. See 18 U.S.C. 3731. Respondents point to nothing that would discredit this certification.[5] Moreover, "an interlocutory appeal by the Government ordinarily is a valid reason that justifies the delay." *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986).

4. Finally, respondents argue (Melendez Carrion Br. in Opp. 14; Diaz Ruiz Br. in Opp. 11-19) that the recorded conversations should be suppressed on legal grounds unrelated to the sealing delay. As respondents note (Diaz Ruiz Br. in Opp 13-14, 16-17), each of those unrelated claims was rejected by the district court (Pet. App. 107a; Resp. C.A. App. 49-119). The fact that respondents have raised a variety of separate claims is no reason for the Court to deny review of the issue on which the court of appeals decided this case. In the event that respondents are tried and convicted, they can raise those claims in a post-conviction appeal.

The unrelated claims that respondents raise involve issues on which, if they prevail, they will be entitled to broader relief than was granted below, since those claims are not limited to the particular recordings that the district court ordered suppressed, but would support the suppression of all the recorded conversations offered at trial. Those claims therefore do not come within the principle that a party may defend a judgment on any ground raised

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[5] Indeed, respondents asserted in district court that the government will be unable to conduct a successful prosecution without the suppressed evidence. Sept. 14, 1983, Tr. 13; Gov't C.A. Br. 44 n.24.

below, as long as the ground asserted would not entitle the prevailing party to broader relief. See *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2788 (1989); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970); *United States* v. *Cores*, 356 U.S. 405, 406-407 n.2 (1958); *United States* v. *Borden Co.*, 308 U.S. 188, 206-207 (1939); *United States* v. *Eccles*, 850 F.2d 1357, 1362 (9th Cir. 1988); *United States* v. *Cardenas*, 748 F.2d 1015, 1023 (5th Cir. 1984); *United States* v. *Williams*, 679 F.2d 504, 507 (5th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); *United States* v. *Swarovski*, 557 F.2d 40, 49 (2d Cir. 1977), cert. denied, 434 U.S. 1045 (1978); *United States* v. *Moody*, 485 F.2d 531, 534 (3d Cir. 1973).

In any event, the claims to which respondents alude are wholly without merit. Respondents suggest (Diaz Ruiz Br. in Opp. 12-15) that the tape recordings should be suppressed because the monitoring agents not only recorded the intercepted conversations on reel-to-reel tapes, which were preserved for use as evidence, but also simultaneously recorded the conversations on cassette tapes. The agents used the cassette tapes to help them prepare contemporaneous written summaries of the intercepted conversations. When each summary was completed, the tapes were ordinarily reused. Resp. C.A. App. 49-56. The district court held that this practice was justified, that the agents did not knowingly record conversations on the cassette tapes that were not simultaneously recorded on the original tapes, that the government did not have a duty to preserve those tapes, and that respondents were not prejudiced by the erasure and reuse of the tapes.[6] Resp. C.A.

[6] Thirty-nine of the cassettes were preserved. Four of those 39 tapes contained a few minutes of conversations that were not recorded on the original reel-to-reel tapes. Resp. C.A. App. 69.

App. 66-70. Respondents cite no authority for their claim that the practice was unlawful. In any event, the good-faith erasure of the cassette tapes provides no basis for suppressing the simultaneously recorded reel-to-reel tapes. See *Arizona* v. *Youngblood*, 109 S. Ct. 333 (1988).

Respondents also claim (Diaz Ruiz Br. in Opp. 15-17) that the monitoring agents listened to conversations without recording them. After hearing the testimony of 25 monitoring agents, the district court found no basis in the record for respondents' allegation that the agents regularly and intentionally engaged in such a practice. In those rare instances where such listening occurred, the court found that it was the result of "innocuous human error." Resp. C.A. App. 72-73, 91-108, 117-118. Moreover, the court found that all of the conversations to which respondents were parties were recorded, and that respondents were therefore not prejudiced by the occasional failure to record the conversation of a non-target. Resp. C.A. App. 113-114. Section 2518(8)(a) of Title 18 requires that intercepted conversations shall be recorded "if possible." This provision was intended to assure that the "best evidence" of the intercepted conversations would be available at trial; it was not intended to protect the targets' Fourth Amendment privacy interests. Accordingly, the few instances of listening without recording do not warrant suppression of the lawfully intercepted, taped conversations. See *United States* v. *Clerkley*, 556 F.2d 709, 718-719 (4th Cir. 1977), cert. denied, 436 U.S. 930 (1978); *United States* v. *Daly*, 535 F.2d 434, 442 (8th Cir. 1976); see generally *United States* v. *Donovan*, 429 U.S. 413, 434 (1977).

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1989

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No. 89-61

In the Supreme Court of the United States

OCTOBER TERM, 1989

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v.

FILIBERTO OJEDA RIOS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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In the Supreme Court of the United States

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JOINT APPENDIX

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FOR THE DISTRICT OF CONNECTICUT

No. H-85-50

UNITED STATES OF AMERICA

v.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1985	
August 23	Indictment
1986	
March 21	Superseding indictment
April 11	Motion to suppress for delay in sealing filed
Dec. 22	Supplemental motion to suppress filed
1987	
Jan. 5 & 6	Government's opposition to motion to supress filed
Sept. 1	Hearing on suppression motion begins
1988	
May 4	Supression hearing ends
May 26	Government files opposition to motion to suppress and proposed findings of facts
June 10	Defendants' proposed findings of facts filed
June 13	Defendants' memorandum of law filed
June 15	Government's reply brief filed

DATE	PROCEEDINGS
July 7	Order denying in part and granting in part motion to suppress tapes for sealing delays
July 20	Government's motion for reconsideration
August 2	Denial of motion for reconsideration
August 5	Notice of Appeal filed
1989	
May 5	Opinion of the Court of Appeals affirming judgment

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CRIMINAL NO. H-85-50 (TEC)

UNITED STATES OF AMERICA

v.

VICTOR MANUEL GERENA, ET AL.

January 5, 1987

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT MELENDEZ CARRION'S MOTION TO SUPPRESS EVIDENCE OF ELECTRONIC SURVEILLANCE

INTRODUCTION

This memorandum of law is submitted in opposition to the defendant Melendez Carrion's motion to suppress evidence of electronic surveillance, dated April 11, 1986. The defendant's claim that the Government failed to seal in a timely manner tapes of communications intercepted in accordance with orders of the court issued pursuant to Title 18, United States Code, Section 2518.

All electronic surveillance evidence in this case was based upon orders issued by the court in the Districts of Puerto Rico and Massachusetts.

* * * * *

AFFIDAVIT

I, Frank J. Bove, Trial Attorney, United States Department of Justice, being first duly sworn, state:

1. I am a Trial Attorney with the Criminal Division of the United States Department of Justice and have held that position since April 1, 1983. I am currently assigned to the General Litigation and Legal Advice Section where my primary responsibility at this time is the investigation of violations of criminal law at the Lorton Reformatory, Lorton, Virginia.

2. From April 4, 1983 until July 29, 1985, I was assigned to assist in the investigation of violations of federal criminal law on the island of Puerto Rico. As part of my duties in Puerto Rico, I was assigned as one of the supervising attorneys for an electronic surveillance investigation into the violation of federal criminal law by clandestine Puerto Rican terrorist organizations. During the course of this investigation, thirty separate applications for authority to intercept oral communications from various premises were submitted to the United States District Court in Puerto Rico of which fifteen were submitted by me between April 27, 1984 and June 6, 1985.

3. On three occasions during this electronic surveillance investigation motions were submitted to the United States District Court in Puerto Rico requesting that the Court seal the recordings and logs in accordance with Section 2518(8)(a) of Title 18, United States Code.

4. (a) I was aware of our responsibility under 18 U.S.C. § 2518(8)(a) to make available to the issuing judge the recording of the contents of any wire or oral communication. Since the targets of this investigation changed residences and vehicles so frequently, we considered the interceptions at various locations to be interrelated and part of the same investigation and submitted motions to seal

at those times when there occurred a meaningful hiatus in our authority to intercept communications.

(b) I was not aware of any legal authority inconsistent with our procedure and believed that we were complying with the requirement of 18 U.S.C. § 2518(8)(a).

5. (a) The first sealing order was signed on October 11, 1984, the day after expiration of authority to intercept conversations from the 1982 Datsun Sentra that was being driven at that time by defendant Filiberto Ojeda Rios. This represented the first time since electronic surveillance began on April 27, 1984 (except for the one-day hiatus explained in paragraph 6(a) herein) that the United States was without authority to monitor at any location pertaining to this investigation.

(b) the next continuous period of electronic surveillance began on November 1, 1984 at Calle 14, Vega Baja, and did not expire until May 30, 1985. As the expiration of this period of electronic surveillance approached, I reminded the investigating agents orally and by memorandum dated May 29, 1985, that the tapes should be sealed as we had done on October 11, 1984. This was the period during which the Federal Bureau of Investigation was preparing the affidavit that was to accompany the application for authorization to intercept conversations from a 1980 Datsun that figured in the investigation as well as unsuccessfully attempting to place electronic surveillance equipment in that vehicle. That application was submitted to Chief Judge Perez Gimenez on June 6, 1985 on which date an order was entered authorizing the interception of conversations from that vehicle for a period of thirty days. This also was the period during which the Federal Bureau of Investigation was actively engaged in physical surveillance of the El Centro Condominium to substantiate the probable cause that led to the June 27, 1985 application for authorization to intercept conversations at that loca-

tion. The four hundred sixty-nine reels of tapes were sealed by Chief Judge Perez Gimenez on June 15, 1985 pursuant to our motion.

(c) The final sealing of electronic surveillance tapes occurred on September 14, 1985, and involved tapes which resulted from monitoring of conversations at the El Centro Condominium from June 27, 1985 until August 30, 1985. I am not familiar with the circumstances surrounding this sealing as I left Puerto Rico on July 29, 1985 and was working in Washington, D.C. at the time.

6. (a) A one-day hiatus occurred on Sunday, September 9, 1984, during the otherwise continuous authority to monitor the 1982 Datsun Sentra from May 11, 1984 to October 10, 1984. This one-day cessation of authority to monitor occurred only because then Assistant Attorney General in Charge of the Criminal Division, Stephen S. Trott, under whose authorization these applications were filed, was out of the country and unable to authorize the applications until Monday, September 10, 1984.

(b) A similar one-day hiatus from authority to monitor occurred on December 2, 1984 during the otherwise continuous authority to monitor conversations at Calle 14, Vega Baja, Puerto Rico, from November 1, 1984 to May 30, 1985. This one-day cessation of authority to monitor occurred only because United States District Chief Judge Juan Perez Gimenez, to whom these applications were presented, did not return to Puerto Rico from a business trip to Washington, D.C. until Sunday, December 2, 1984, and, consequently, we were unable to present the renewal application to him until Monday morning, December 3, 1984.

(c) A final break in authority to monitor the public telephones in Vega Baja occurred from February 18, 1985 until February 28, 1985. During this time, however, the United States continued this electronic surveillance investi-

gation by maintaining authority to monitor the residence at Calle 14, Vega Baja. Thus, in following our practice of considering these interceptions at various locations to be interrelated and part of the same investigation (see paragraph 4(a)), we did not consider this an event that necessitated immediate sealing. Moreover, this eleven-day hiatus in monitoring authorization at the public phones in Vega Baja was necessitated by the decision of the Justice Department's Office of Enforcement Operations to have the Federal Bureau of Investigation extensively expand and revise the affidavit that was to accompany the application for renewal. This revised and expanded affidavit was presented to Chief Judge Perez Gimenez on March 1, 1985 at which time he entered an order authorizing continued interceptions of wire communications at the public telephones in Vega Baja.

/s/ Frank J. Bove

FRANK J. BOVE
Trial Attorney
United States Department of Justice

SUBSCRIBED AND SWORN TO before me this 31st day of December, 1986.

Pamala A. Nelson
Notary Public for
District of Columbia
Comm. expires 1/31/91

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CRIMINAL NO. H-85-50 (TEC)

UNITED STATES OF AMERICA

v.

VICTOR MANUEL GERENA, ET AL.

RULING ON GOVERNMENT'S MOTION TO QUASH AND MODIFY SUBPOENAS DATED AUGUST 31, 1987

On August 31, 1987, the Defendants served four subpoenas duces tecum upon the Government which were directed to Assistant United States Attorney Albert S. Dabrowski, Assistant United States Attorney Frank Bove, Deputy United States Attorney Robert Mueller and Assistant United States Attorney Roberto Moreno. The subpoenas seek documents from each individual. The Government has moved to quash the subpoena directed at Assistant United States Attorney Dabrowski and has moved that the Court modify the subpoenas directed to Messrs. Bove, Mueller and Moreno. The Court heard argument on the instant motion on September 1, 4 and 8, 1987.

Pursuant to Rule 17.(c) of the Federal Rules of Criminal Procedure, the Court hereby orders that the subpoena directed at Mr. Dabrowski be quashed and that the subpoenas directed at Messrs. Bove, Mueller and Moreno be modified as set forth below.

Statement of Facts

The four subpoenas duces tecum which are the subject of the instant motion all sought compliance by September 1, 1987, and all, with one exception, seek the following documents. (The subpoena directed to Mr. Dabrowski, does not contain paragraph 3.):

1. Any documents of any kind, including, but not limited to, memoranda, directives, reports, letters, interoffice correspondence, airtels, etc. in the possession, custody or control of the United States Justice Department, including, but not limited to, the offices of the F.B.I., the U.S. Attorney's offices in Puerto Rico and Connecticut, and the Criminal Division of the Justice Department in Washington, D.C., that pertain or relate, in whole or in part, in any way to the Title III electronic surveillance in the above-captioned case and, in particular, to the statutory sealing requirement contained in 18 U.S.C. § 2518, issued or written at any time between January 1984 and the present.

2. Any memoranda, publications, booklets, books or training materials of any kind, published and/or printed by or for the Department of Justice, including, but not limited to, the United States Attorney's Manual and training manuals from the Attorney General's office, which were available to you at any time between January 1984 and the present.

3. A list, by name of case, docket number, and location of court, of any Title III cases in which you have been involved in any manner as an employee of the Department of Justice (excluding pending investigations not yet disclosed).

Discussion

At the hearing on the instant motion, counsel for the defendants agreed that the subpoena for a list of "any Title III cases in which [Messers. Bove, Mueller and Moreno] may have been involved" is beyond the scope of Rule 17(c) of the Federal Rules of Criminal Procedure as it calls for a list which does not already exist.

With regards to paragraphs one and two of the subpoenas, counsel for the Government agreed to provide the defendants with those documents and publications, related to Title III sealing requirements, which were in the possession of Messrs. Bove, Mueller and Moreno during the period of time that electronic surveillance was being conducted in this case. However, the defendants asserted that, in addition to the items encompassed by the time period described above, they had special need for those Title III sealing documents which were created between the conclusion of the electronic surveillance and the present time. The defendants argue that such documents would demonstrate that the Government had conspired to cover-up the Government's failure to seal the tapes. Defendants maintain that by asserting a legal theory intended to explain any delay in sealing, the Government has waived any privilege that would otherwise attach to said documents.

To the extent that the subpoenas duces tecum call for privileged material they are hereby modified. Those documents which were created by the Government after September 14, 1985 (the date the last electronic surveillance tapes were sealed) comprise material plainly protected from discovery under the attorney-client privilege and/or the work product doctrine. Defendants' assertion that the Government has waived the privilege by raising a defense to the alleged sealing delays is wholly unconvincing and lacking in authority. With respect to material created after September 14, 1985, the Government has taken no actions which can be construed to constitute waiver.

However, in order for this Court to investigate the defendants' allegation that the Government may have attempted to cover-up any sealing delays, the Government shall forthwith file under seal all materials created after September 14, 1985 which concern the question of sealing. The Court will review these documents *in camera* and determine whether there is any evidence of irregularity.

Accordingly, the subject documents created after September 14, 1985 are privileged and the instant subpoenas duces tecum are modified so as to exclude them from their ambit. *United States v. McGrady,* 508 F.2d 13, 18 (8th Cir. 1974), *cert. denied,* 420 U.S. 979 (1975). Moreover, as the subpoenas request all documents which relate to Title III electronic surveillance "in any way" and "[a]ny memoranda, publications, booklets, books or training materials of any kind . . . ," they are overly-broad, unreasonable and oppressive. Therefore, only those documents concerning Title III sealing matters which were available to Messrs. Bove, Mueller and Moreno between the time the electronic surveillance in this case was commenced and September 14, 1985 are deemed relevant, unprivileged and properly within the scope of the subject subpoenas. However, as Assistant United States Attorney Dabrowski was not assigned to this case until several months after the initial indictment was returned, the subpoena directed against him is hereby quashed.

Conclusion

The subpoena duces decum directed against Assistant United States Attorney Dabrowski is hereby quashed. The

subpoenas duces tecum directed to Messrs. Bove, Mueller and Moreno are hereby modified and only those materials concerning Title III sealing matters which were available to Messrs. Bove, Mueller and Moreno during the period of time the electronic surveillance was conducted, along with those documents created prior to September 14, 1985 which bear directly upon the issue of sealing are properly within the scope of the subject subpoenas duces tecum. The subpoenas are further modified so as to exclude the list of Title III cases in which the subpoenaed attorneys had been involved which was sought in paragraph 3.

The Government shall forthwith file under seal, for *in camera* review, all written material created after September 14, 1985 relating to alleged sealing delays.

SO ORDERED.

Dated at Hartford, Connecticut this 8th day of September, 1987.

/s/ T. Emmet Clarie
T. EMMET CLARIE
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

H-85-50

UNITED STATES OF AMERICA, PLAINTIFF

vs.

VICTOR GERENA, ET AL., DEFENDANTS

September 1, 1987

Before: Honorable T. EMMET CLARIE, U.S.D.J.

APPEARANCES

For the Plaintiff:
OFFICE OF THE U.S. ATTORNEY
450 Main Street
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By: ALBERT S. DABROWSKI, ESQUIRE
JOHN A. DANAHER, ESQUIRE
WILLIAM J. CORCORAN, ESQUIRE
DAVID A. BUVINGER, ESQUIRE

For the Defendant Antonio Camacho-Negron:
LINDA BACKIEL, ESQUIRE
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Philadelphia, Pennsylvania 19144

* * * * *

[234] Q. All right. But aside from the A tape circumstances where you were doing that at the time in between the completion of one reel-to-reel and rewinding, at any time during the monitoring operations, it was possible for monitoring agents to record on the cassett recorder without recording on the reel-to-reels?

A. Yes, that's correct.

Q. All right. You, during the course of your testimony, refreshed your recollection by referring to a document you had before you.

What is that document, sir?

A. I have the Count C memo that I have before me.

Q. All right. Now, that memo which has been marked, I believe, as Government's Exhibit 376 or 75?

A. Seventy-five.

Q. Excuse me. This is the memo which sets forth the recording procedures to be followed during the electronic surveillance operations, is that correct?

A. That's correct.

[235] Q. All right. Were these instructions in effect throughout the entire electronic surveillance operations; that is, from April 27th, of 1984 until the expiration of the surveillance, electronic surveillance on August 30th, 1985?

A. Yes.

Q. Is there anything in that document that refers to this work copy that you've testified about today?

A. No, sir, there isn't.

Q. You indicated you had advised Mr. Corcoran about the existence of these work copies prior to your testimony today?

A. That's correct.

Q. And when is the first time that you advised counsel for the Government of the existence of the work copies?

A. I couldn't say for sure.

Q. Give us your best estimate.

A. You're talking about the current prosecuting team?

Q. Correct.

A. I would say sometime after October 12th of 1985.

Q. Can you tell us why it is that no mention [236] is made in Government's Exhibit 375 about the cassette recorders and the work copies?

A. Yes, sir.

Q. Why is that?

A. We discussed this at length prior to initiating the Title 3, the work copies—

THE COURT: When you say "we", who is we?

THE WITNESS: I'm sorry, Your Honor. George Clow, Frank Bove, Roberto Moreno, Cal Sieg, in particular on this case, on this specific instance.

We made no mention of that because the particular reason for the cassette copy was strictly work copy. When you were going to use it for the agents to work off of, when you were going to erase those tapes, that's why the basic thing was we made no mention anywhere of that work copy. Just to keep—really to keep questions from being asked about it.

Q. (BY MR. REEVE) Well, you mean like questions by nosey defense counsel or are you referring to questioning by monitoring agents?

MR. CORCORAN: Objection.

THE WITNESS: No, in your words, sir, [237] nosey defense counsel.

Q. (BY MR. REEVE) I thought the extent of these directions was to advise the monitoring agents of what specifically they should and should not do at the various sites during the conduct of electronic surveillance in this case?

A. That is correct.

Q. So how did you advise them, since you omitted it from the written terms that were provided to them?

A. As I said, it was omitted purposefully. Those instructions were given to the monitors verbally.

Q. So that was part of the oral instructions that you and/or Agent Clow provided the agents as they came down, as you testified, every thirty to sixty days?

A. That's correct.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal Number H-85-50 (TEC)

UNITED STATES OF AMERICA, PLAINTIFFS

VS.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

September 8, 1987

Before: Honorable T. EMMET CLARIE, U.S.D.J.

APPEARANCES

For the Plaintiff:

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* * * * *

[37] [MR. REEVE:] Mr. Bove, who may well say, "No, I never had any meetings," maybe that's not a true statement. But under this—under the ruling right now, as stated orally by the Court, it is that we can't ask other people who were present at these meetings to determine what happened.

THE COURT: We'll cross that bridge when we get to it.

MR. REEVE: But Your Honor, we're crossing that bridge right now unless we're going to recall Agent Rodriquez later.

THE COURT: The ruling of the Court will be that up through September 13, '85, as I stated previously, if there's anything in the file, as counsel said he would examine, if there's anything in the file giving directions as to how the sealing should take place and that memorandum is contrary to or inconsistent with anything that has come out or contrary to the law or—if it just exists, it shall be produced.

After the sealing has taken place, it is the Court's opinion that you cannot—you cannot destroy communication between counsel in the preparation for their case, whether defense counsel or Government counsel.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 (TEC)

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

October 15, 1987

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

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[52] BY MR. WIESELMAN:

Q. Go to the 192 for Levittown 784-9625.

A. What would be the tape number?

Q. Forty-six, I'm sorry.

A. Okay. The 192 for 784-9625, tape number 46.

Q. Mr. Terrazas was the agent submitting property on the 192?

A. That is what I put here in my 192.

Q. That would mean he is the agent whose name appeared last on the 504; is that correct? Is that how you would determine what agent's name to put in there?

A. Yes.

Q. I may be wrong, but let's look at the 504 for 9625.

A. Yes.

Q. That 504 seems to indicate to me that Calvin Sieg is the man dropping off the tape. How is it possible that Mr. Terrazas' name appears on the 192?

A. Correct. Mr. Sieg was the agent, and in [53] this case, gives custody to the other agent.

Q. So in fact even before Mr. Sieg's name is Maria Villaruel's name as a monitoring agent?

A. Correct.

Q. But yet, Mr. Terrazas' name appears on the 192 as the person dropping off the tape. Do you have an explanation as to how that sort of discrepancy could occur?

A. No, sir, I have no explanation.

Q. Is it possible there was another 504 that may have had Mr. Terrazas' name there?

A. No. It is a 504 pertaining to this 192, because the tape number is right on the face of the 192.

Q. But you don't know whether this 504, according to your procedure, perhaps there were errors on it and it was corrected, if this was a recreated 504, you wouldn't know that fact, would you?

A. I wouldn't know, but may I see the other for the same date?

Q. Sure, Look at the others.

(Pause.)

* * * * *

[61] Q. On both of those days, you have the three telephones with Mr. Terrazas incorrectly as the delivering agent. That is on June 11. On June 12, you have the three telephone reels incorrectly stating on the 192 that they were delivered by Mr. Terrazas, yet, on both those days, the residence tapes, the 504's correctly indicate that Mr. Sieg dropped off the tapes. Can you explain that discrepancy?

A. No, sir.

Q. Since the tapes of June 11 were all received by you at the same time, at 8:35 in the morning of June 12, isn't it strange that you would have put Mr. Terrazas as the 192 receiving agent for three of them and Mr. Sieg as the 192 receiving agent for just the fourth one, even though—

MR. CORCORAN: I object. It is a question as to where—

THE COURT: Isn't it strange—

MR. WIESELMAN: I will withdraw that.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 (TEC)

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

October 27, 1987

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

[76] BY MR. CORCORAN:

Q. Mr. Bove, what is your present position with the criminal division of the Department of Justice?

A. I'm a trial attorney with the criminal division. I'm employed in the general litigation and legal advice section.

Q. In Washington, D.C.?

A. That's right.

Q. Mr. Bove, what is your educational background?

A. I went to Rutgers University. Bachelor's degree from there in 1968. Went to Rutgers Law School. Got a JD there in 1971.

Q. After law school, after graduating law school, what did you do?

A. I became a Law Clerk to The Honorable Daniel H. Huyett, III.

THE COURT: What's his name?

THE WITNESS: H-u-y-e-t-t. He's in the Eastern District of Pennsylvania, in Philadelphia.

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[112] Q. Mr. Bove, directing your attention to the month of October, of 1984, as one of the supervisory attorneys in this case, you were one of the people who had responsibility to comply with the provisions of the Title III. statute.

Did you take any steps to familiarize yourself with the provisions of that statute?

A. Yes, I did.

Q. What steps did you take?

A. I read a number of items before we went up on the Title III. in April 1984.

Q. What did you read?

A. I read the statute first. That was a good starting point. I read the Title III. sections. In addition to that, I read a monograph that you had prepared for the Department of Justice dealing with issues involving Title III. wiretapping.

I had access to and used a Fishman hard copy book dealing with interception practices. The other item I had access to, which I used at various times in this investigation, was a paper book, Georgetown Law Journal issue dealing with criminal law, and it had a portion on interception issues.

Q. That is Georgetown's annual review in the drill procedure in the 12 circuits and the Supreme Court?

A. That's correct.

Q. These are materials which you have prior to going up on the wire April 784. Were you aware there was a sealing requirement in the statute?

A. Yes, I was.

Q. Were you aware of that in July of '84?

A. Correct.

Q. In August of '84?

A. Correct.

Q. September and October of '84?

A. Correct.

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[125] Q. When did that authority end?

A. The authority ended on the Datsun on October the 10th.

Q. Next day you filed the motion?

A. That's correct.

Q. Now, I want to direct your attention to paragraph 5 of that motion.

A. I have it.

Q. It reads, "Through October 10, 1984 Special Agents of the FBI at all times were physically, technically ready and able to accept communications pursuant to one or more of the Court's authorizations." Is that correct?

A. Yes.

Q. Did you write that?

A. Yes, I did.

Q. What was your purpose in putting that in the motion?

A. I was explaining to the Judge why we were coming to him at that time to seal these tapes. We still had authority at that point to intercept conversation from the 1983 Jeep Cherokee and the 1982 Jeep Suzuki. We had no physical and [126] technical capability of doing it at that time because the agents had not been able to find a safe

time and situation to make the surreptitious entry into those vehicles and put the equipment in.

Consequently, this was the first time when we had no physical capability of intercepting in this investigation where we had any authority to intercept.

Q. As to the Levittown tapes in this case, in your view at that time, when were you obligated to seal those tapes?

A. The theory that I worked under and put into this motion to seal was that our obligation came up on October 10, 1984 when we had our first break in our physical capability of intercepting conversations in any location where we had a bug.

Q. When was your obligation to seal the Datsun tapes; when did that arise?

A. When the order expired on October 10.

Q. And Calle Taft and El Cortijo?

A. The same day.

THE COURT: How about the Levittown location? That expired, depending on which date you take, the latest one, July 23, '84, they hadn't gotten anything since July 9, '84, as I [127] understand it as a practical matter.

Your theory, as you expressed it, was applicable to October 10, '84. How did it apply to Levittown?

THE WITNESS: I understand your point, your Honor. I made the decision and no one that I discussed the case with at that time suggested that I make any other determination. The decision that I made was that this was all an interrelated investigation.

As I pointed out, the locations were changing so rapidly that by the end of September and early October 1984 we literally had authority to intercept at seven different facilities, either phones, cars and/or residences.

There was no telling at that point how often this investigation was going to take another turn.

To us the only reason we went in and sought authority to intercept conversations at El Cortijo and Bayamon was because that was the latest address where we felt that Ojeda was living.

The only reason we switched from Levittown was because his residence, in effect, switched. At that point we thought it might have [128] been a temporary switch. We had no way of knowing, and we felt we were still involved in the same interrelated investigation.

I don't think I had any thoughts at that time that this investigation would last for frankly, another year and would involve so many locations. It, in fact, did, but that was the theory that I operated under.

• • • • •

[130] A. I didn't feel that the requirement to seal came up until we had a break in the investigation. Not to be repetitious, but I felt that the first break came not on October 10, because that was the first time when we had no physical or technical capability of intercepting any conversations of any targets in this case under a court order.

THE COURT: As I understand it, your application of the statute, as you saw it, was that it was applicable to the target subject, so to speak, as long as there was a continuous order against him rather than the location being the target where the authorization originally stemmed from?

THE WITNESS: That's the way I viewed it, your Honor. Hindsight is always more accurate. Having read a lot more cases in the last three years about this area of the law, not wanting to ever jeopardize the federal investigation, I might handle it differently today, but that's the way I viewed it at that time.

• • • • •

[142] Q. Let me ask you this: To what extent does that hiatus period at the public telephones at [143] Vega Baja come into play with regard to sealing the tapes from the public telephones in Vega Baja?

At the time what was your position with regard to the statutory requirement how that hiatus played a part, if any?

A. I operated under the assumption that hiatus did not necessitate any sealing.

Q. Any sealing of which tapes?

A. Of the tape from public telephones.

Q. So, the public telephones were authorized by an order of January 18th, and on the 17th it was shut down, and there's a hiatus period; is that right?

A. That's right.

Q. During that period of time were communications intercepted from the residence?

A. We certainly had authority and physical capability of intercepting conversations at the residence.

I'd have to check the logs to specifically tell you whether, in fact, there were conversations. I don't know, off the top of my head.

THE COURT: The two dates in this interval period are what, Counselor? I think I [144] saw you pointing to them.

MR. CORCORAN: The numbers are February 17, 1985 and March 1, 1985.

From the exhibit, the first order to intercept conversations at the public telephones were signed on January 18th and it expires on February 17th, and then the next application for the public telephones at Vega Baja is made on March 1st and it's extended again on March 31 and April 30th and finally expires on May 30.

THE COURT: The period intervening is how many days?

MR. CORCORAN: The period intervening, your Honor, would be, I believe, 11 days.

THE COURT: Was there any authority existing for those 11 days, Mr. Bove?

THE WITNESS: At that time, your Honor, the Government had authority and physical capability of intercepting at the residence in Vega Baja. That application order was in effect.

THE COURT: That's just above it.

THE WITNESS: That's correct.

THE COURT: The public telephones, there was no existing order for 11 days; is that [145] correct?

THE WITNESS: I'm not sure if that's exactly 11 days, because February has fewer days, and I haven't counted them. It's approximately 11 days.

THE COURT: There was no authority existing for that period?

THE WITNESS: For the public telephones, that's correct.

BY MR. CORCORAN:

Q. That same 11-day period, Mr. Bove, there was authority at the residence at the Calle 14?

A. That's correct.

Q. Therefore, what was your position with regard to the effect, if any, of that hiatus with regard to the sealing requirement?

A. My position was that a brief hiatus like that did not necessitate a sealing of tapes from the preceding order.

* * * * *

[183] Q. Directing your attention to October 10, 1984, at that point you had the authority to [184] intercept both the Jeep Cherokee and the Jeep Suzuki at those two automobiles. You had the authority to intercept conversations from those vehicles; is that correct?

A. That's correct.

Q. Your testimony is that you did not have the physical capability to intercept because no bug was installed in either of those vehicles as of that date.

A. That's correct.

Q. So, you're not saying that there was a hiatus because you lacked legal authority to intercept, but because you did not have the physical capability—I believe those were the words you used—to intercept on or about October 10, 1984?

A. That's right. The way I looked at it you needed both; you needed authority and you had to have the physical capability of actually intercepting something.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 TEC

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

October 28, 1987

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

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[37] Q. All right. He was the one who was preparing the boxes on October 11, 1984, and you testified yesterday that the boxes weren't ready; is that right?

A. They all weren't ready, and that is why the Judge had to come back.

Q. Now, did you contact Agent Salicrup—did you contact Mr. Salicrup and say, "How long will it take you to get these boxes ready? We have to seal these tapes immediately"?

A. No. My contacts were with George Clow, I believe, and Joe Rodriquez before he left the island, and certainly with Marlene Hunter on several occasions. And at the time we would seal them.

Q. Did you tell Mr. Clow or Agent Rodriquez or Agent Hunter that you wanted to know how long it was going to take the FBI to get these tapes ready, and they should let you know immediately?

A. I don't remember the exact words of the conversation. I talked to them on several [38] occasions and, you know, asked them—reminded them to seal the tapes and present them to the judge. And perhaps I didn't indicate to them clearly as I could have what "immediately" meant. It certainly—in the words of one of the cases I read recently, it at least means sooner than later. But other than that, I'm still not sure what it means. But I realize we had an obligation to do it, if that answers your question.

Q. Well, Mr. Corcoran's—you called it something other than a memo, but the document that was written by Mr. Corcoran—

A. Right.

Q. —in the sealing section of that memo, it specifically says that the statute requires that you are do it immediately.

A. That's right. That is the language of the statute.

Q. And it says that Mr. Corcoran's memo advised you that if you don't do it immediately, you run the risk of suppression.

A. That's correct.

Q. And I take it that a careful prosecutor would read "immediately" to mean do whatever necessary to affectuate immediate sealing; is that [39] correct?

A. I think that is fair. In the case at that time that I was familiar with, the only case that I am aware of that cited Mr. Corcoran's monogram expressed anything that dealt with delays of eight to twelve months.

Q. That is the Gigante?

A. That is correct. The other case sited in that monogram do not express delays up to thirty or forty

days. I am not suggesting that I would want to delay it that long, but to put it back in historical context of May and June of 1985, that was what I was working with. And I regret, frankly, now that I didn't put more pressure on the FBI to do it sooner.

Q. All right. How did you learn of your responsibilities as a supervising attorney for an electronic surveillance operation? You had never done it before, where did you start and did you go to someone and say, "What are my obligations?" And if so, who did you go to?

A. I started before we went up—before reading the statute, obviously I read Mr. Corcoran's monogram, talked with other attorneys in our section, Including Mr. Corcoran, Mr. Bouvinger, I [40] discussed it from time to time with Marge Carlson. Mainly just by reading the statute and reading the format from previous Title III. surveillances and talking to attorneys who had been handling them before.

Q. When you say, "Reading the format from previous Title III. cases," what does that mean?

A. There had been previous Title III. cases, obviously, in the Department of Justice, and, you know, the records and files were available about what the applications looked like, what the affidavits looked like, motions to seal, things like that.

Q. All right. Did you ever receive anything in writing which delineated your responsibilities as a supervising attorney in electronic surveillance operation?

A. No.

Q. Did you ever receive in the course of your time as a United States attorney or as an attorney in the Department of Justice any electronic surveillance training?

A. I don't remember, sir, ever attending any seminars or conferences on electronic surveillance in my recollection. They have such seminars from [41] time to time, I don't remember ever attending any of them.

Q. All right.

Q. You as a U.S. Attorney are familiar with the U.S. Attorney's manual; is that right?

A. Yes, sir.

Q. All right. And there is a section in the U.S. Attorneys manual which deals with the electronic surveillance, does it not?

A. That's right.

Q. All right. And just by way of example, one of the things that it says in the electronic surveillance section of the U.S. Attorneys manual—and I am referring to section 9-7.314—is that you were to advise the technical agents to record and make records of all technical arrangements that they created in a electronic surveillance case. Were you aware of that requirement?

A. I don't believe I was.

THE COURT: Why don't you show him the section.

MR. REEVE: I will, your Honor. I asked the clerk, and it was my fault because I couldn't give her the number.

• • • • •

[44] Q. If you didn't advise them as supervising attorney, do you know how they would have found out or determined that that was a requirement?

A. Well, my experience with the Bureau is that they record everything. They never do anything without recording—I could never have a conversation with them if it wasn't recorded for future references. I don't mean that electronically recorded, I mean—

Q. Memorializing in writing?

A. Yes.

Q. All right. But you have no recollection of ever advising the technical agents of that requirement?

A. No, sir.

Q. All right. How did you get the sealing materials that were available to you? You [45] indicated in that there were four sources that you used, the Fishman treatise, Mr. Corcoran's memorandum and the other two were what?

A. The Georgetown Circuit Notes.

Q. Okay. Was the fourth the statute itself?

A. Yes.

Q. All right. I understand how you got the statute. How did you get Mr. Corcoran's memo and the Georgetown Circuit Notes? Did you make a request for those materials, or were they simply in San Juan, or what?

A. I don't specifically remember, counselor, whether I requested them, but I know that they were supplied to me long before we went up on the Title III. I am speaking about Mr. Corcoran's monogram. It was something that was circulated in the criminal division, and I had the use of it long before we went up. The same thing with the Fishman book, it was available to me.

Q. All right. So these weren't materials that were given to you specifically at the beginning of this electronic surveillance, perhaps they were materials that you had in your file or files which you had obtained during the course of your service for the Justice Department.

[46] A. I'm not sure how to answer that. They were available to me. Obviously we were contemplating a Title III. investigation, and the Justice Department wanted me to have the materials available, and they were considered valuable materials and they were supplied to me. Perhaps they wouldn't have been supplied to me if I were working on a different kind of case that were not likely to involve Title III. surveillance.

Q. All right. And were those the only materials that were supplied to you, or were those just the materials that you relied upon?

A. The only other source that would have been available to me, which I frankly did not use, was the *United States Attorneys' Manual* because that was different, that was in the main United States attorneys office and we worked in a separate office, and I didn't trust the reliability whether it was updated, frankly, and there are only so many sources you can follow and I elected to use the ones that I did use.

Q. If you had—certainly if you had wanted an updated *U.S. Attorneys Manual*, it would not have been difficult to get that from the Justice Department in Washington or some other source?

[47] A. I don't know how difficult it would be, frankly. Sometimes it took quite a bit of time to get something from Washington to Puerto Rico.

Q. But you made a determination, as I understand it, that you had enough source material and you felt, therefore, there was no need to rely on the *United States Attorneys' Manual* or consult it.

A. Well, Mr. Corcoran's monogram I think is pretty all encompassing, and the Fishman book is, I gather, one of the state-of-the-art books on the subject.

THE COURT: What book is that?

THE WITNESS: It is a book on electronic surveillance, your Honor, by a man named Fishman.

THE COURT: What is the title of it?

THE WITNESS: I'm not certain. I think it is the *Law of Electronic Surveillance,* perhaps.

MR. REEVE: Your Honor, the author of the book is Clifford S. Fishman, and the title of the book is *Wiretapping and Eavesdropping.*

* * * * *

[52] Q. All right. And one of the requirements of Title III., and I believe it is section 2519, is that the Justice

Department and the court filed reports with the administrative office with respect to each electronic surveillance order. [53] Are you familiar with that provision?

A. Yes.

Q. Were you involved in that?

A. Yes.

Q. And in fact, of course, when you filed those reports with the administrative office, you filed them with respect to each separate order in this case.

A. I didn't actually file them.

Q. In terms of—

A. The Judge actually filed them.

Q. All right. But were you involved in the preparation of that report?

A. I assisted him in putting some information together, yes.

Q. All right. And the way that that report was ultimately filed with the administrative office, was it reported for each separate order?

A. I think that's right.

Q. All right. So getting back to the sentence, the third sentence which you said you relied on, that sentence says, "Immediately upon the expiration of the period of the order or extensions thereof," and I ask you again, how did that support your position that you could hook a [54] bunch of separate orders together and seal at the end of a series of interrelated orders?

A. I can only repeat what I said before, counsel, and I viewed these as interrelated and that is the way I handled it. There is nothing more that I could say about it. I viewed them as extensions of an interrelated investigation.

MR. REEVE: Your Honor, I would like to show the witness Mr. Corcoran's memo. I have a copy. I don't believe that it has been marked as a full exhibit, but I might be wrong. The clerk advises me it was never marked as a

exhibit. I would like to have it marked for identification and as a full exhibit absent of objection by the Government.

What I have is the redacted version of that memo. I do not have the entire version, and I believe that the entire version was filed in camera, but I don't know what filing number that was.

THE COURT: Mark it for identification, counselor.

(*Defendants Exhibit 2438*: Marked for identification.)

MR. REEVE: Mine is approximately [55] ten pages. It has holes in the side which I put there. There are no markings I don't believe on this copy. And with the permission of the Court, I would just ask at this point an opportunity to copy this so I have a copy for my file.

THE COURT: Show it to counsel, maybe he is familiar with it.

MR. REEVE: I think he should be. He prepared it, your Honor.

MR. CORCORAN: No objection.

THE COURT: Full exhibit.

(*Defendants Exhibit 2438*: Received in evidence.)

BY MR. REEVE:

Q. Showing you Defendants Exhibit 2438, which, as I advised you, is not a full copy but is a redacted copy, which was presented to the defense, and if I can direct your attention—you are free to look at any part, but if I could direct your attention to what I believe are the sealing sections, which start on page 26 and end in our redacted version on page 28, can you indicate what language, it any, in that memorandum which has not been marked as Defendants Exhibit 2438, what language, if any, supports your [56] position that the sealing requirement is not activated until the end of numerous interrelated but separate orders?

A. Again, the language is quite similar to the language in the statute that I was relying on. And on page 27 under part C, the standard, the second paragraph, third sentence, it states, "If an extension order has been obtained, the sealing need not be done until the termination of the period covered by the extension, even if there is a hiatus during the period initially authorized," and that is covered by the extension.

Q. There are no references in there, are there, to interrelated orders as being—strike that. There are no references to the Government's flexibility in terms of combining a number of separate orders and then sealing at the end of those numerous orders, are there?

A. No, nor was I aware of any orders with respect to this question.

Q. In fact, in paragraph two on page 27, the third sentence says if an extension has been obtained, the sealing need not be done until the termination of the period covered by the extension, even if there is a hiatus during the period [57] initially authorized and not conferred by the extension; is that correct?

THE COURT: Ask him to explain that hiatus, he used that several times.

BY MR. REEVE:

Q. Can you answer the Court's question?

THE COURT: What do you understand that to mean, this hiatus.

THE WITNESS: As I understand it, your Honor, to me, hiatus was a period like these brief periods that took place a couple of times when we couldn't get the authorization from Washington because someone was out of the country, or the brief period in mid- to late-February when there was a technical difficulty, even though we had authority and the monitoring equipment in place. They

were not—we did not view them nor did they, in fact, become permanent ends to the monitoring to those locations, they were merely brief hiatuses.

* * * * *

[85] BY MR. REEVE:

Q. Was it your understanding at the time that the statutory sealing requirement had—strike that. Was it your understanding at the time that depending upon the number of orders, the number of separate locations in a single order that the fact that there were a number of separate locations in a single order impacted in any way on the statutory sealing requirement?

A. I'm sorry. I don't understand your question, counsel.

Q. Well, you have got for the July 26th order, you have got five separate locations, five separate electronic surveillance intercept locations; correct?

[86] A. Correct.

Q. Does the fact that those five were all applied for and authority was granted in one piece of paper, one order, is it your testimony that that has an impact upon the Government's sealing obligations?

A. I think it certainly shows the wide-ranging extent of this investigation and how it was changing rapidly from location to location. Certainly, why consider it typical in my limited experience with electronic surveillance investigations to have that kind of situation where the investigation involves so many locations at the same time a continual application of authority to request moving from different location to different location and people that were, in fact, moving from location to location on a regular basis?

Q. There are, in fact, a number of cases, both reported and unreported, which deal with a number or a series of wiretap orders; correct?

MR. CORCORAN: I would object only to counsel is asking for authorities which existed at the time.

MR. REEVE: I will rephrase the [87] question.

BY MR. REEVE:

Q. At the time, during the period of 1984, you were aware that there were a number of cases in which there were multiple electronic surveillance orders; correct?

A. I don't know that I was aware of any quite as involved as this one.

Q. That is not my question. My question is, were you aware that there were cases in which there were multiple electronic surveillance orders at different locations?

A. Yes.

Q. All right. And did you look at any of those cases that you were aware of in 1984 where there were multiple electronic surveillance locations to determine whether or not the theory that you are expounding today was applied in any of those multiple operations?

A. I don't remember specifically, counsel, now, which cases I read at that time and exactly what they said. I read cases and I know the language that I relied on talked about extensions and relevant extensions like the language you pointed to in the Georgetown book, and on the [88] basis of that, you know, that language and my feeling that we were following Mr. Ojeda from one residence to another is the basis on which I made the decision.

Q. From any of the four sources you relied on, was there any language in any of those sources which said that related orders at different locations can constitute extensions?

A. The language was scarce as any dealing with that topic. The language that you pointed to and that I pointed to in the other sources that I referred to really don't deal with that question precisely that I am aware of.

Q. So your answer is that there was no such language in the four sources; is that right?

A. I can't point to it now, and if you can point to it, I will be happy to take a look at it.

Q. And you reviewed those sources in preparation for your testimony.

A. I have reviewed the sources that were available to me at the time.

Q. So you can state with confidence that there was no such explicit language in any of the source material you had available to you at the time which said that an order at a different [89] location would constitute an extension of an earlier order?

A. Right now, I can't remember any language one way or the other on that question.

THE COURT: If you carried it through, you might help the witness. In other words, if you had a wiretap at X location covering A and B, and then you subsequently had a renewal or the so-called renewal of the application against A who was then either in a car or at another residence, would you consider the second renewal a bona fide renewal for purposes of sealing because it was one of the two original objectives set forth in the first application?

THE WITNESS: I think, your Honor, what I am saying is that at that time I looked at it as though it was related as an extension of the same investigative authority.

THE COURT: That was your measure?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. REEVE:

Q. As you sit here today, you can't tell us any authority, case law or otherwise which supported your interpretation of extension; is [90] that correct?

A. Well, I can point to the language that I pointed out to you at your request.

Q. All right. Now, you had this, and the record should reflect I am holding in the air this Fishman volume on Wire Taps and Eavesdropping, you had that available to you during 1984, is that correct?

A. Yes.

Q. And did you rely on this as an authoritative or book on wire tapping?

A. I used it on occasion.

Q. All right. And were you aware—is it fair to say, if you know, that this was kind of an authoritative source within the Department of Justice, if you know?

A. I think it is.

Q. All right. And was there any language in the Fishman treatise which supported your novel interpretation? Strike that. Was there any language in the Fishman treatise which supported the interpretation that you have testified about here today?

A. I can't tell now, sir. I haven't look it it within the last several months.

[91] Q. Did you review the Fishman treatise at some point prior to October 11, 1984?

A. I'm not certain, sir. As I said, there were three or four different sources that I was using, and I can't state for certain now whether I looked at it before October of '84, or not.

MR. REEVE: Your Honor, I want to show the witness the Fishman book and direct his attention to section 190 of

that book which is at page 282. I have a copy of that page for the Court. I provided it to Government counsel.

BY MR. REEVE:

Q. Have you turned to page 282 of the Fishman treatise?

A. Yes, I have it.

Q. Would you read the first sentence of section 190, please?

A. "Although Title III. delays the sealing and notice deadline when the initial warranty is extended, it did not postpone those deadlines when a new warrant is obtained on a different phone or premises."

Q. Is there any follow-up to that page I gave the Court and Government counsel? Does that section end at page 282 and another chapter begins?

[92] A. Yes, it does.

Q. So what you have before you and what the Court has before it on page 282 is a full copy of that chapter or section, is it not?

A. It appears to be.

Q. Is there any lack of clarity in this sentence as to how that applies to your theory and your opinion?

A. It is fairly clear.

Q. Is it your testimony that you knew about that section in Fishman which was contrary to your legal theory and ignored it, or that you didn't read that section of Fishman before you ventured forth pursuant to your legal theory?

A. Well, I absolutely deny that I read it and ignored it.

Q. Did you read it?

A. I don't recall specifically. Apparently not, or else I would have given some second thoughts as to what I did.

MR. CORCORAN: Counsel, may I see the exhibit, please.

MR. REEVE: Your Honor, before I show the Government the exhibit, just so that the record is clear, what I would like to do is give [93] the witness the xerox copy which I handed Government counsel and the Government and let the witness tell us if that xerox page which I would propose be marked as the full exhibit is the same as the page from the Fishman treatise that I just reviewed.

THE WITNESS: It looks the same to me.

MR. REEVE: I will show it to Government counsel, but the one page should be marched as a full exhibit. It is, as I already indicated, page 282 of the Fishman treatise.

MR. CORCORAN: No objection. Your Honor.

THE COURT: Very good. Full exhibit.

(*Defendants Exhibit 2440*: Received in evidence.)

BY MR. REEVE:

Q. Is it your testimony, sir, that you were unaware of this section of the Fishman treatise at the time you made your decision not to seal the tapes until October 11th and October 13th of 1984?

A. I don't remember seeing that language.

Q. Is it your testimony that you looked at any of these source materials to make a [94] determination if your legal theory was supported in any way by those materials?

A. I think I have been clear that I did look at those source materials.

Q. Did you look at them before July 25th of 1984 when authority at Levittown expired?

A. I can't state for certain, sir.

Q. Did you look at them before October 11th before you filed the first motion to seal in this case?

A. I think I can pretty well circumstate that I looked at them before.

Q. Did this theory that you have expounded, is this—was this theory developed by you individually or did you

develop it in consultation with others, or did someone tell you about this theory? That is a compound question, I understand, but can you answer it? Where did it come from? Where did this legal theory come from?

A. I'm not sure how to answer your question where it came from. It is the way that I viewed the case at all times.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 (TEC)

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

December 2, 1987

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

* * * * *

[93] Q. All right. What I am going to ask you to do is just one, assuming that that happened on this day in between the removal of reel 6 and placement of reel 7. I am just going to ask you to rewind one of the two machines and we are going to assume that Agent Balizan, or one of the other two agents, is doing the other reel.

And I am going to tell you when it begins and then the Government is going to set their watches and we will put on the record how long it took to rewind and how long the various steps took. All right. All ready? Are you all set to do this?

A. Yes.

Q. I will say ready, set, go.

(Whereupon, the witness complied.)

MR. REEVE: The record should reflect that that rewinding process took approximately one minute, 40 seconds by my watch, give or take a few seconds.

MR. BOYLE: The Government agrees with that.

BY MR. REEVE:

Q. You were prepared at the time you hit that to activate the cassettes; is that right?

[94] A. Yes. It won't stay one.

Q. I stopped my watch at approximately 2:05, and so my my count, it took approximately 25 seconds from the time that the one reel was removed to place the other reel on the machine. I don't know if the Government has similar times.

MR. BOYLE: I accept that representation.

MR. REEVE: All right.

THE COURT: It even agrees with my watch, Counselor.

MR. REEVE: Good. I'm glad there is something consistent.

BY MR. REEVE:

Q. Now, Agent Aponte, you agree that it is physically impossible for you, and however many agents you had to put at that monitoring site, that it is physically impossible for you to change reels and place new reel-to-reels onto those two recorders within two or three seconds and activate?

A. Yes, sir.

Q. That is a physical impossibility; is it not?

A. I am just thinking that probably they take out the reels and place the other two right [95] away.

Q. You have to thread them, right, what you just did; right?

A. I beg your pardon?

Q. You have to thread them as you just did in order to get them to record?

A. Yes, sir.

Q. You can't just slap the reel on there, it has got to be threaded through as you just did in this courtroom?

A. Yes, sir.

Q. And that threading process alone took you approximately 25 seconds; correct?

A. Yes, sir.

Q. And you weren't going slowly, you were trying to do it as you did it at the monitoring site; weren't you?

A. Yes, sir.

Q. And you have never seen anyone in your experience as a monitoring agent change reels in two or three seconds?

A. No, sir.

Q. So your testimony is that it is a physical impossibility to shift from reel 6 to reel 7 in the time—strike that. It is [96] physically impossible to do it in 5 seconds.

A. You are right, sir.

Q. And it is correct, is it not, that these reels are 90 minutes worth of reel; that is, if you run it from the beginning to the end in the record mode, that they can tape 90 minutes worth of conversation?

A. Yes, sir.

Q. And the reason you know that is because there were some tapes that you testified about yesterday where you would put a tape on and it would be continuous interception and that would take approximately one-and-a-half; right?

A. Obviously.

Q. If you don't turn it off, it goes to an hour-and-a-half?

A. Yes.

Q. And your logs with respect to reel 6 indicate that the total amount of conversation or interception is on reel 6 takes 79 minutes?

A. According to the log.

Q. According to the log. So you have about eight-ninths of the tape used up; is that right?

A. Yes, sir.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 (TEC)

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

February 17, 1988

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

* * * * *

[224] BY MR. WIESELMAN:

Q. Sure. Were you a monitor at the Levittown 784-9625, reel number 52 on June 17, 1984? Were you a monitor?

A. I was on duty at that time, sir.

Q. And you had custody of that tape from 3:00 o'clock until 11:30 p.m.; correct?

A. Yes, sir.

Q. At which point you delivered custody to Mr. Yannessa; correct?

A. At 11:30 p.m. on June 17th of 1984.

Q. And you have the 504 in front of you; correct?

A. That is correct, sir.

Q. After Mr. Yannessa received the tape, you have no knowledge what occurred to the tape; is that fair to say?

A. That is correct, sir.

Q. The 504 has no time—withdraw that.

After Mr. Yannessa received the tape [225] after 11:30 on June 17, the 504 indicates that Mr. Yannessa received custody—released custody of tape to Elsur; is that correct?

A. Yes, sir.

Q. The columns for date and time, however, are blank, are they not?

A. That is correct, sir.

Q. So we don't know when Mr. Yannessa released custody to the Elsur room; is that correct?

A. I don't know that, sir.

Q. And although the 504 then indicates that Mr. Salicrup received the evidence on June 18, 1984, we don't know the time he received the evidence; is that correct?

A. I don't know that, sir.

Q. Do you have any reason to believe that this particular interception was not a reel? In other words, did you record Levittown 784-9625 on a cassette, to your knowledge?

A. I do not know that, sir.

Q. Okay.

MR. WIESELMAN: Your Honor, with the Court's permission—

THE COURT: Would it show on your [226] log?

THE WITNESS: On the next page, it has reel number 52 from that number in that reel-to-reel box.

MR. WIESELMAN: Your Honor, with the Court's permission, can we open the original 504 for this reel.

THE COURT: Is this an original?

MR. WIESELMAN: Yes, sir.

THE COURT: Any objection to that?

MR. CORCORAN: No, your Honor.

THE COURT: All right. Do you want to advise the Clerk how that is done so—I guess one advising would be sufficient so we won't spoil the tape.

MR. WIESELMAN: For the record, I am advising the Court and we have slit it on the one or two occasions we have opened it. There is a transparent tape.

BY MR. WIESELMAN:

Q. Agent, I am handing you the original 504, 192 and hopefully tape 52. Could you take—could you remove that box for us, please.

A. (Witness complies.)

Q. That box indicates that it should contain [227] reel number 52; correct?

A. Yes, sir, it does.

Q. And to the best of your recollection, you made a reel on that day, but if I am not mistaken that box contains a cassette. Would you know why this original reel 52 is on a cassette as opposed to a reel?

A. No, sir, I don't.

Q. Now, do you see on the 504 the evidence tape on the bottom; that indicates that Mr. Salicrup placed the evidence in the room on June 19th, but there is a second sealing tape on April 26th of 1986; isn't there?

A. Yes, sir.

Q. Now, I want to show you Government's Exhibit 395—

THE COURT: Excuse me, counselor, so it will be clear to me, was that the date—and I can remember just vaguely—when a court order was issued to make copies of certain cassettes?

MR. WIESELMAN: Yes, sir.

THE COURT: All right.

MR. WIESELMAN: This is Government's Exhibit 395, a 302 documenting the opening of those tapes, and they include this one. And [228]apparently, they were copied, if I am not mistaken. And I show you this simply so that you have a complete record.

BY MR. WIESELMAN:

Q. But do you have any knowledge or recollection or explanation for this as to why it was necessary to open and copy reel 52-C from telephone 784-9625, reel 52.

MR. CORCORAN: It is tape 52.

BY MR. WIESELMAN:

Q. It is tape 52 now.

A. This is this one here?

Q. Yes.

THE COURT: Tape number what?

BY MR. WIESELMAN:

Q. Let me clarify. Do you ever recall using a cassette tape to make an original recording other than A cassettes?

A. No, sir, I don't.

Q. Okay. So to the best of your knowledge, would this tape in front of you now not be the original—obviously it is not the original reel, but do you have any recollection of making this particular cassette?

A. Those are my initials.

[229] Q. These are your initials on it. And you don't recall making that cassette; is that correct?

A. And the date, and I do not recall making this cassette.

Q. What is the date on there?

A. The date is June 17th of 1984 and it is marked down as 52-A.

Q. Do you have any explanation as to how that sticker bearing your initials and date got on this cassette?

A. May I have a minute to review this?

Q. Certainly.

(Pause.)

A. Would you repeat the question, sir?

BY MR. WIESELMAN:

Q. Sure. Can you explain for us how—you testified that you don't recall making any cassettes, so I ask you for an explanation as to how this tape marking with your initials and your handwriting comes to be found on this cassette which purports to be reel—which purports to be reel tape 52 from 784-9625.

A. No, sir, I can't give an explanation for that.

Q. Agent—

[230] THE COURT: Do you know where it was made, that particular tape, or what is written on it?

THE WITNESS: The items written on the tape are—it says USDC-PR 81-39, reel number 52-A, date June 17, 1984. File number 174-A 9:58. Original. Monitor's initials. Those are mine. Telephone number 809-784-9625.

BY MR. WIESELMAN:

Q. Agent, have you ever seen this cassette before?

A. I don't recall, sir.

Q. Is there any way—you don't recall whether you have or not, or you don't recall the cassette?

A. I don't remember having seen it.

Q. And you will confirm your earlier testimony that you never made an original recording, an entire original recording, on a cassette; is that right? To reframe that, other than using cassettes for A cassettes, did you not use cassettes to make the original that was to be sealed with the Court; is that right?

A. That is right, as I said earlier, yes.

Q. And tell me, is there anything in FBI [231] procedures that would allow the removal of an identifying

sticker such as that bearing your signature and placing on another piece of evidence without your consent?

A. No, sir.

Q. In fact, is there anything in FBI procedures that would have allowed the removal of an identification piece of evidence or sticker such as that and placing on another piece of evidence even with your consent, would that be appropriate FBI procedures to the best of your knowledge?

A. No, sir.

THE COURT: How did you come to make this particular tape? Was it an A tape or was it a copy of something else?

THE WITNESS: Sir, the note says 52-A, so it would seem that it was an A tape for telephone number 809-784-9625.

THE COURT: And do you recall having made an A tape?

THE WITNESS: No, sir. Not for those numbers. And those are my initials.

THE COURT: And you put them on?

THE WITNESS: Yes, I put them on.

[232] THE COURT: Why would you put them on unless you had some affiliation with this particular piece of evidence.

THE WITNESS: I would say that I made the tape since those are my initials; and the date on this is June 17th. Excuse me, June 17th of 1984.

THE COURT: And did you make it on the machine or similar type of machine that counsel pointed to on which original recordings were made, or did you simply like go upstairs now and make a recording or a copy of a tape that was already in existence? If you know.

THE WITNESS: No, sir. I would assume that I made it on a cassette recorder as an A tape.

THE COURT: And then kept it as an original.

THE WITNESS: Yes, sir. That is why it was placed in the FD-504.

BY MR. WIESELMAN:

Q. Agent, let's finish up this area if we can, quickly. You have no recollection, you have already testified, of making any original recordings other than A cassettes on little [233] cassettes as opposed to reel-to-reels; is that right?

A. Just A cassettes?

Q. Yes. Log 52 indicates if a tape was made of conversations and you labeled it 52; is that right?

A. That is correct.

Q. There is no indication on that log or anywhere else that A tape 52-A—in other words, an A cassette—was made; is that correct?

A. That is correct, sir.

Q. And generally, if I am correct by looking at your other logs, you write whether you are making an A cassette during a transition, right, generally?

A. Yes, sir.

Q. And that was not done in this case on log 52; is that right?

A. That is correct, sir.

Q. So nothing in the log would indicate that a cassette tape 52-A was made.

THE COURT: What page is that on so I can look at that, too, with you.

MR. WIESELMAN: Page 58 of Volume 2, part one.

[234] THE COURT: Page 58.

MR. WIESELMAN: Of Volume 2, part one.

BY MR. WIESELMAN:

Q. In fact, Agent. that tape 52 was the only telephone tape made for 784-9625 on June 17, 1984. There was no

reel 53 made on June 17, was there? In fact, reel 53 was made the next day on June 18; correct?

A. That is correct, sir.

Q. And the last interception on reel 52 was at 4:19 in the afternoon; correct?

A. That is what the monitor log indicates, sir.

Q. And the reel was removed at what, 11:00, 11:30, as per the log?

A. Yes, sir.

Q. So not only is there no indication that an A tape was made, in fact, to the contrary, every indication from the log would indicate that no A tape was made on June 17, 1984; correct?

A. According to the log, yes, sir.

Q. Because there was no change over of reels on that day, correct, with respect to telephone 784-9625?

[235] A. That is correct, according to the log.

Q. And what we have here that you found in the original 504 envelope purporting to contain original 52-C is a box, an Ampex Precision tape box which generally contains a five-inch reel; correct?

A. That is correct, sir, with the information on the back that reads USDC-PR Number 81-39, reel number 52, date June 17th of 1984. File number 174-A, 9:58 as an original. Monitoring initials OSW. Telephone number 809-784-9625.

Q. And that identifies the content of this box as 52, not 52-A; correct?

A. That is correct, sir.

Q. I am showing you a—

THE COURT: Will you inquire into one more point, counselor. Were A tapes put in this reel-type box, if you know?

THE WITNESS: No, sir. They should have been put in the plastic cassette recorder boxes.

THE COURT: And then into the envelope?

THE WITNESS: Yes, sir.

[236] BY MR. WIESELMAN:

Q. So to clarify something the Court asked earlier, you have no recollection of ever making this tape; is that right?

A. That is correct, sir.

Q. And you have no recollection of ever having seen this tape prior to our pulling it out of this original 504; is that right?

A. That is correct, sir.

Q. And you have no explanation as to how an evidence sticker bearing your writing appears on this cassette; is that correct?

A. I have no recollection, that is correct, sir.

Q. And let me show you the 192—it doesn't matter which, I happen to be showing you a copy of 53-B—but these 192's—and the Court will notice, all have pretyped on them 15-inch reel. Do you see that pretyped notation on this 192?

A. Yes, sir, I do.

Q. And do you see on this original 192 from tape 52 the taping of telephone monitoring on 6/17/84?

A. Yes, sir, I do.

[237] Q. Now, between the words one and the words of, there is a cross-out in pen; is there not?

A. There is, sir.

Q. And that cross out occurs where on these preprinted 192's the words five-inch reel would be, does it not?

A. Repeat the question, please.

Q. Sure. The cross out on that 192 from original tape 152 were on the same spot for preprinted form one would expect to find the typed content five-inch reel?

A. That is correct.

Q. And that is what seems to be crossed out on this original 192 of tape 52; correct?

A. Correct.

Q. And over it are the words "cassette tape" written in pen; correct?

A. Correct, sir.

Q. And is that your handwriting where it says cassette tape?

A. No, sir.

Q. Do you know whose handwriting that is, sir?

A. No, sir.

Q. Is this—are you certain that the 52-A [238] there is your handwriting, or—

A. Yes, sir, that is my handwriting.

Q. And on this box, is reel 52 your handwriting?

A. That appears to be my handwriting.

THE COURT: The curious thing to me is how can you say you never saw the tape before or the box before if your handwriting appears on it?

THE WITNESS: Sir, I don't recall seeing it.

THE COURT: Do you have any explanation of how your handwriting appears thereon and for you not to have seen it?

THE WITNESS: No, sir. But the curious thing there are some notations on the side of the box that is 6/2/84 number 37. And there is another white label pasted underneath this blue tape. I don't know what it contains.

BY MR. WIESELMAN:

Q. Take a look at the log you are looking at for June 7. You are looking at Volume 2, part one and I am going to turn back—we are now on June—you are on June 2?

A. Yes, sir.

[239] Q. Was tape number 37 created on that day for the telephone 784-9625?

A. Yes, sir, it was.

Q. And is that your handwriting on the side of the box, if you recollect?

A. No, sir, it is not.

Q. It is not, is it? And you testified just a moment ago that whenever you made an original reel, you took a cellophane wrapped reel and you opened it to assure that you were using a brand new virgin reel to make your recording; correct?

A. Yes, sir.

Q. So what we have here in this original evidence envelope is a cassette for which you have no explanation and which you maintain you have never seen before; is that right?

A. I maintain that I don't recall seeing it before.

Q. And we have a box in there bearing a sticker placed over another sticker; correct?

A. That is correct, sir.

Q. With writing on the side of the box which you have never seen before; correct?

A. I don't recall seeing it, sir.

Q. Which is not your handwriting?

[240] A. That is correct.

Q. And at least at first blush would appear to contain reel 37, June 2nd of '84, which happens to be the same; but in any event, a reel 37 of 9625 was recorded on June 2nd of 1984; correct?

A. That is correct, sir.

Q. Some 15 days before you recorded 9625 on June 17th of 1984; correct?

A. Correct, sir.

Q. And do you have any explanation why the original box that you used is not in that evidence envelope?

A. No, sir, I don't.

Q. And again, do you have any explanation as to the peculiarity of having in front of us with us the cassette which you don't recall having seen before?

A. No, sir, I have no explanation.

Q. And certainly if you used the original boxes when you take those original boxes to make a brand new reel-to-reel, they don't already have on them a Government sticker such as we see underneath this reel 52, d· they?

A. That is correct, sir.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. H-85-50 TEC

UNITED STATES OF AMERICA

vs.

VICTOR MANUEL GERENA, ET AL., DEFENDANTS

April 21, 1988

Before: The Hon. T. EMMET CLARIE, Senior U.S.D.J.

SUPPRESSION HEARING

[99] BY MR. REEVE:

Q. Mr. Aschkenasy, you have just indicated your conclusions about ten original tapes which you examined in this case and subjected to the various tests about which you have testified in the last week; is that right?

A. That is correct.

Q. How many tapes were created in Puerto Rico in this case by the FBI?

A. I don't have a number. I have no knowledge of the number, exact number of tapes that were created.

Q. Do you have an understanding of the rough number?

A. I understand it was about a thousand tapes.

Q. So that I understand your testimony, is it is your testimony that you have reached conclusions about only ten of the approximately 1,000 tapes created in Puerto Rico in this case?

A. I can only reach conclusions about those tapes that I analyzed, and in this case, I analyzed ten tapes and I reached conclusions about nine out of the ten.

[100] Q. So your answer to that is you have no conclusions about any of the other tapes created beyond the ten which you examined?

A. Obviously, as I stated in my previous answer.

Q. Yes. And you, as an expert, would not apply your findings with respect to those ten tapes about which you have developed conclusions to the remaining 990-plus tapes, is that right?

A. If I haven't seen them, I have no statement to make about them.

Q. So you would not choose as an expert to speculate about any findings you might or might not make with respect to the 990-plus tapes created in this case in Puerto Rico?

A. I guess speculation belongs in the stock market, not in my field.

Q. So you decline as an expert to give any opinion whatsoever with respect to the authenticity of over 990 tapes created in Puerto Rico in this case?

A. I and any other proper expert would not give an opinion.

Q. So you would not take, for example, the fact that one out of these ten tapes you cannot [101] reach a conclusion as to originality; correct? Strike that.

One out of the ten tapes, original tapes you examined, your expert opinion is you can't reach an opinion about the originality of that one tape?

A. There is no data to support any finding.

Q. And so as you sit here today, it's your opinion that that tape could be an original; right?

A. No finding means no finding.

Q. Right. It could be either an original or copy and you don't know?

A. That's correct.

Q. Having subjected all of your expert tools and abilities to that tape, you have no conclusion?

A. That is correct.

Q. And you would not take that one out of ten finding on these tapes and then predict that on 10 percent of the remaining tapes, you would also not reach a conclusion; right?

A. I would not use that as a predictor, that's correct.

Q. Right. Based on your expertise, you would not make that kind of prediction?

A. I would hope not.

Supreme Court of the United States

No. 89-61

UNITED STATES, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 10, 1989.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

October 10, 1989

U.S. GOVERNMENT PRINTING OFFICE 1989 – 262 203:30009

(5)

No. 89-61

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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37 pp

QUESTION PRESENTED

Whether tape recordings of conversations obtained pursuant to court-authorized electronic surveillance should be suppressed because of a delay in the judicial sealing of the tapes, even if the tapes that are offered into evidence are proved to be the unaltered originals.

PARTIES TO THE PROCEEDING

In addition to the named parties, Hilton E. Fernandez Diamante, Jorge A. Farinacci Garcia, Elias S. Castro Ramos, Orlando Gonzalez Claudio, Isaac Camacho Negron, Ivonne Melendez Carrion, Angel Diaz Ruiz, and Luis A. Colon Osorio are respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 875 F.2d 17. The opinion of the district court suppressing evidence (Pet. App. 17a-96a) is reported at 695 F. Supp. 649. The opinion of the district court on the government's motion for reconsideration (Pet. App. 15a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1989. On June 26, 1989, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 14, 1989, and the petition was filed on that day. It was granted on October 10, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2515 provides:

> **Prohibition of use as evidence of intercepted wire or oral communications.**
>
> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2518 (1982 & Supp. V 1987) provides in relevant part:

> **Procedure for interception of wire, oral, or electronic communications**
>
> * * * * *
>
> (8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be

> kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.
>
> (b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.
>
> (c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.
>
> * * * * *
>
> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * *

STATEMENT

A 17-count indictment returned in the United States District Court for the District of Connecticut charged respondents and ten others with offenses pertaining to the September 12, 1983, robbery of the Wells Fargo depot in West Hartford, Connecticut, during which approximately $7 million was taken.[1] Evidence connecting respondents to that robbery was discovered during an investigation of their involvement in a rocket attack on the United States Courthouse in Hato Rey, Puerto Rico. The targets of the investigation, including respondents, were members of a Puerto Rican organizaton known as "Los Macheteros," the "machete wielders." During the investigation, court-authorized electronic surveillance was conducted at six different locations between April 1984 and August 1985.[2]

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[1] Respondents and their co-defendants were charged with bank robbery, in violation of 18 U.S.C. 2113(a); aggravated bank robbery, in violation of 18 U.S.C. 2113(d); theft from an interstate shipment, in violation of 18 U.S.C. 659; interstate and foreign transportation of stolen money, in violation of 18 U.S.C. 2314; interference with commerce by robbery, in violation of 18 U.S.C. 1951; and conspiracy, in violation of 18 U.S.C. 371 and 1951. Of the ten co-defendants who are not respondents in this case, two have pleaded guilty to charges arising out of the indictment, four have been convicted after a jury trial, and one has been acquitted. Three of the ten remain fugitives.

[2] In addition to the interceptions described below, electronic surveillance was conducted at the residence of two co-defendants in Santurce, Puerto Rico, and at a condominium in Hato Rey, Puerto Rico, that was used by the conspirators. Pet. App. 20a-21a. The district court did not suppress the tape-recorded conversations obtained as a result of those interceptions, *id.* at 79a, 94a, and the admissibility of that evidence is therefore not at issue here.

Following the return of the indictment in this case, respondents moved to suppress all the evidence obtained as a result of electronic surveillance. Pet. App. 17a-96a; Gov't C.A. Br. 4-5.

After an eight-month suppression hearing,[3] the district court granted the motion to suppress with respect to conversations recorded at two locations; the court denied the motion in all other respects. Pet. App. 17a-96a; Gov't C.A. Br. 3. The government appealed, and the court of appeals affirmed. Pet. App. 1a-14a.

1. On April 27, 1984, Chief Judge Perez-Gimenez of the United States District Court for the District of Puerto Rico entered an order under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521 (Title III), authorizing the FBI to intercept oral communications at the apartment of respondent Filiberto Ojeda Rios in Levittown, Puerto Rico. Ojeda Rios, who had no home telephone, was known to use three public telephones across the street from his apartment. Accordingly, the judge also authorized the interception of wire communications at those telephones. On May 11, 1984, Judge Perez-Gimenez also authorized the placement of a microphone in respondent Ojeda Rios's automobile, a Datsun Sentra. The orders for the car and for the Levit-

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[3] The court heard testimony from 20 FBI agents who monitored the recorded conversations, from FBI agents who were involved in presenting the tapes for judicial sealing, from the FBI electronic surveillance clerk who maintained custody of the tapes after interception, from the Department of Justice attorneys who supervised the electronic surveillance investigation, and from defense and government experts who addressed the issue of the authenticity of the tapes. Pet. App. 17a.

town apartment and the public telephones were extended on several occasions. Pet. App. 18a-21a.

In July 1984, suspecting that his conversations in Levittown were being intercepted, Ojeda Rios moved from ~~Levittown~~ to El Cortijo, Puerto Rico. In light of that move, the FBI ceased monitoring at Levittown on July 9, 1984, although the final extension for the Levittown apartment and telephones did not expire until July 23, 1984. On July 27, the government received authorization to intercept the telephones and to place a microphone in respondent Ojeda Rios's new residence in El Cortijo. That order was extended several times, as was the order permitting the interception of conversations in Ojeda Rios's Datsun Sentra. The final extension for the El Cortijo order expired on September 24, 1984. Pet. App. 72a-73a, 75a. The final extension for the surveillance of Ojeda Rios's Datsun expired on October 10, 1984. The Levittown, El Cortijo, and Datsun tapes were judicially sealed on October 13, 1984. Pet. App. 19a-21a, 69a n. 8, 73a; Gov't C.A. Br. 7 & n.5.

On November 1, 1984, the court authorized the FBI to intercept conversations at the Vega Baja, Puerto Rico, residence of defendants Juan Segarra Palmer and Luz Berrios Berrios. The court extended that authorization order each month for seven months; the last extension expired on May 30, 1985. On January 18, 1985, the court also authorized the FBI to intercept conversations at two public telephones near the Vega Baja residence. That order expired on February 17, 1985, and the FBI therefore temporarily ceased intercepting conversations as of that date. Because the government wished to revise the affidavit that was being used to support the requests for electronic surveillance authorization, the government did not apply for an extension of the January order until March 1, 1985.[4]

[4] The revisions turned out to take longer than expected, so that the affidavit used with the March extension application was substantially the same as the affidavit that had been used in prior applications. The revised affidavit was used the following month. Pet. App. 14a, 79a-80a.

The new order issued on that date. After two more extensions, the final Vega Baja intercept order expired on May 30, 1985. The tapes of all conversations recorded at the Vega Baja residence and the nearby public telephones were judicially sealed on June 15, 1985. Pet. App. 21a, 79a-80a; Gov't C.A. Br. 9-10.[5]

2. In their motions to suppress all the conversations intercepted during the investigation, respondents alleged that the tapes were inadmissible because they had not been sealed "immediately" upon the expiration of the intercept orders and extensions, as required by 18 U.S.C. 2518(8)(a). Pet. App. 17a. During the suppression hearing, respondents also sought to show that the tapes had been altered. The government offered expert evidence to rebut those claims, and it made a detailed showing of the measures that had been taken to preserve the integrity of the tapes. *Id.* at 23a-24a, 31a-35a, 51a-53a. With respect to the judicial sealing requirement, the government showed that Frank Bove, the supervising attorney who was responsible for having many of the tapes sealed, was aware of the statutory sealing requirement, but interpreted the statutory language to mean that the sealing obligation did not arise until all related intercept orders and their extensions had expired. *Id.* at 76a-77a. Accordingly, Bove had arranged for Judge Perez-Gimenez to seal the related Levittown, El Cortijo, and Datsun tapes on October 11 and 13, 1984, at the time of the expiration of the last of the intercept orders for those locations. *Id.* at 35a-36a, 62a.

[5] The two-week delay in sealing the Vega Baja tapes arose from a misunderstanding between the responsible officials in the FBI and the prosecutor about who was to take responsibility for initiating the sealing process. Pet. App. 84a-87a.

Bove arranged for the sealing of the tapes from the Vega Baja intercepts at the end of May 1985, following the end of the last extension of the intercept authorization for that location. *Id.* at 79a, 85a-86a.

3. At the conclusion of the suppression hearing, the district court admitted some of the tapes of intercepted conversations and excluded others. With respect to the challenge to the integrity of the tapes, the district court credited the testimony of the government's expert and found that the government had proved by clear and convincing evidence that the tapes being admitted into evidence were in their original form and had not been tampered with. Pet. App. 55a-61a.

Turning to the issue of the delays in the judicial sealing of the tapes, the court first considered the sealing of the Levittown tapes. The government contended that the El Cortijo order was an extension of the Levittown order because the El Cortijo order simply followed the movement of the target, respondent Ojeda Rios. If that was so, the government argued, the sealing obligation for the Levittown tapes did not ripen until September 24, 1984, when the final El Cortijo extension expired. Pet. App. 67a-70a.

The district court rejected that argument. It held instead that the obligation to seal the tapes from the oral and wire interceptions at Levittown arose no later than July 23, 1984, when the final extension of the original Levittown order expired.[6] Based on that analysis, the district court concluded that there had been at least an 82-day delay in sealing the Levittown tapes, from July 23 to October 13. *Id.* at 63a-65a. The court found that delay to be "excessive

[6] Although the interception at Levittown was discontinued several days before the Levittown intercept order expired, the court found it unnecessary to decide which event triggered the obligation to have the court seal the tapes. Pet. App. 63a-66a.

as a matter of law" and held that it required the automatic suppression of all the Levittown tapes. The court thus found it irrelevant whether the government could prove that those tapes had not been altered, *i.e.*, that the delay in sealing did not affect the integrity of the tapes. *Id.* at 66a. The court accordingly noted that because it was suppressing the Levittown tapes, it would not address the question whether the integrity of those tapes had been maintained. *Id.* at 30a n.3.

The district court refused to suppress the El Cortijo tapes, although there was a 19-day delay in sealing those tapes. Unlike the delay in sealing the Levittown tapes, the court concluded that the 19-day delay in sealing the El Cortijo tapes was not "so great as to require automatic exclusion." Pet. App. 76a. The court then found that the government had provided a satisfactory explanation for the 19-day delay. The court first noted that the government had proved by clear and convincing evidence "the immaculacy of the tapes." *Id.* at 75a. Moreover, the district court found that the sealing delay "came about in good faith": it did not prejudice the defendants in any way, and the government "derived no benefit from its failure to seal immediately." *Id.* at 76a. Finally, the court concluded that the sole cause of the delay was attorney Bove's misunderstanding of the statutory sealing requirement, and that Bove acted promptly to have the tapes sealed after the expiration of the Datsun Sentra extension order on October 10, 1984, which was the date that Bove believed triggered the sealing requirement. Pet. App. 76a-79a.

The court next considered the Vega Baja public telephone tapes; it held that the obligation to seal the tapes made pursuant to the initial intercept order ripened on February 17, 1985, when that order expired. The court

acknowledged that the initial order was extended several times, but it held that the extensions could not postpone the sealing obligation unless the government provided a "satisfactory explanation" for the 12-day hiatus between the expiration of the original order and the first extension. The government explained that it had been attempting to revise the underlying affidavit on which the Vega Baja applications were based, but the court found that explanation unsatisfactory. Pet. App. 82a-83a. Accordingly, the court calculated that 118 days had passed between the expiration of the original intercept order on February 17, and June 15, when all the Vega Baja tapes were sealed. The court held that this delay, like the delay in sealing the Levittown tapes, was "excessive as a matter of law," and it suppressed the Vega Baja public telephones tapes that had been obtained pursuant to the January 18 order. *Id.* at 83a.

The court did not suppress the remaining Vega Baja tapes, despite the 16-day delay (from May 30 to June 15) in sealing those tapes. The court reasoned that suppression of those tapes was not required because the government had proved by clear and convincing evidence that the tapes had not been altered and because respondents were not prejudiced by the delay, which was the result of a good faith misunderstanding between the prosecutor and the FBI as to who would initiate the sealing process. Pet. App. 84a-88a. The court specifically found that the government had not used the 16-day delay "to tamper with the tapes or in any way use the tapes to gain some advantage." *Id.* at 84a.

4. The government appealed the suppression of the 455 Levittown tapes and the 34 Vega Baja public telephone tapes that were recorded pursuant to the January 18, 1985, intercept order. The court of appeals affirmed. Pet. App. 1a-14a. The court observed that when tapes are not sealed within one or two days after the expiration of a

wiretap order, the government bears the burden of offering a satisfactory explanation for the delay as a prerequisite to the tapes' admissibility. *Id.* at 7a. The court disagreed with those circuits that "excuse sealing delays simply upon proof of the integrity of the tapes." *Id.* at 8a.[7]

The court of appeals agreed with the district court's conclusion that there had been a delay of at least 82 days in sealing the Levittown tapes. Pet. App. 11a. Although it did not agree with the district court's conclusion that the tapes should be suppressed "on the basis of time alone," *id.* at 11a-12a, the court nevertheless concluded that suppression was required. In light of the length of the delays in sealing, the court found that the government's explanation was not "satisfactory," because it "resulted from a disregard of the sensitive nature of the activities undertaken." *Id.* at 12a.[8]

With respect to the Vega Baja public telephone tapes, the court of appeals agreed with the district court that the government was required to provide a "satisfactory explanation" for the 12-day hiatus between the expiration of the January 18 order on February 17, 1985, and the issu-

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[7] The court cited cases from the Third, Fifth, Seventh, and Eighth Circuits as adopting the approach it rejected: *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States* v. *Diadone*, 558 F.2d 775, 780 (5th Cir. 1977), cert. denied, 434 U.S. 1064 (1978); *United States* v. *Cohen*, 530 F.2d 43, 46 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *United States* v. *Angelini*, 565 F.2d 469, 471 (7th Cir. 1977), cert. denied, 435 U.S. 923 (1978); *United States* v. *Lawson*, 545 F.2d 557, 564 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *McMillan* v. *United States*, 558 F.2d 877, 879 (8th Cir. 1977).

[8] Although the court agreed that the same mistaken interpretation of law that led to the delay in sealing the Levittown tapes "might help to excuse the nineteen-day delay [found] accept[able] by Judge Clarie in respect to the later El Cortijo tapes," it imposed a higher standard for the longer delay. Pet. App. 13a.

ance of the March 1 extension order. The court of appeals also agreed with the district court that the government's explanation for that delay was insufficient. Pet. App. 14a. The court therefore treated the January 18 order as if it had never been extended, so that the tapes obtained pursuant to the January 18 order should have been sealed shortly after February 17, rather than in June, after the expiration of the final Vega Baja intercept order. The court of appeals thus agreed with the district court that there had been a 118-day delay in sealing the tapes recorded pursuant to the first Vega Baja telephone intercept order. Because it found that delay unjustified, the court agreed with the district court that the products of the January 18 order had to be suppressed. *Ibid.*

SUMMARY OF ARGUMENT

1. Section 2518(8)(a) of the federal wiretap statute requires that immediately after the expiration of an order authorizing electronic surveillance, recordings of any intercepted conversations must be presented to the judge who issued the order and sealed under his direction. The statute further provides that the presence of such a seal, or a satisfactory explanation for its absence, is a prerequisite for the use of the recordings in evidence. The question in this case is whether Section 2518(8)(a) bars the use of evidence which was sealed by the court, but in which the sealing was not done "immediately" after the expiration of the electronic surveillance orders.

Section 2518(8)(a) bars the admission of evidence only in cases in which a judicial seal is absent; it does not require the exclusion of tapes when the tapes are sealed but the sealing was delayed. The plain language of Section 2518(8)(a) supports our construction: the statute requires a "satisfactory explanation" for the "absence" of the required seal, not for a delay in affixing it. Nor is there anything in the legislative history or context of Section 2518(8)(a) suggesting that suppression should be ordered in the case of a delay in sealing. The fact that Section 2518(8)(a) does not provide a remedy for delays in sealing does not, of course, mean that tape-recorded evidence must be admitted regardless of its trustworthiness. Quite apart from any remedies provided by Title III, the courts possess ample authority to police the admission of evidence whose authenticity is challenged.

2. Even if Section 2518(8)(a) is interpreted to require a "satisfactory explanation" for sealing delays, that term should be construed, consistent with the purpose of Section 2518(8)(a), to mean an explanation that satisfies the court that the tape-recorded evidence has not been tampered with. In accordance with that approach, most courts have held that late-sealed tapes are admissible if the government can demonstrate that the tapes have not been altered. There is no justification under the language or policy of the statute to exclude evidence because the delay was lengthy or because it resulted from some lapse on the part of the government. Neither factor has any significant bearing on the essential matter to be established by the explanation: the integrity of the tapes. Suppression also cannot be justified because of the possible deterrent effect of the suppression order. If the tapes are shown to be authentic, it would be inconsistent with the purposes of Section 2518(8)(a) to suppress them simply because suppression might affect the government's conduct in future cases. In any event, the government already has strong incentives to comply with the sealing requirement in order to avoid or minimize the burden of lengthy suppression hearings necessary to establish the integrity of the tapes when sealing has been delayed.

3. Even if the government is required to provide a "satisfactory explanation" for sealing delays, and even if the reasons for the delay in sealing or the length of the delay are relevant considerations, the explanation for the delays in this case was still "satisfactory." All the delays at issue here resulted from the supervising attorney's good faith and objectively reasonable interpretation of the statutory requirement permitting sealing after "extensions" of the original intercept order. Accordingly, if the government can establish that the tape-recorded evidence in this case is authentic, then the evidence should be admitted.

ARGUMENT

I. TITLE III DOES NOT REQUIRE SUPPRESSION OF TAPE-RECORDED EVIDENCE BECAUSE OF A DELAY IN SEALING THE TAPES

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521, establishes specific procedures for conducting electronic surveillance of oral and wire communications. Among those procedures is the requirement that recordings of intercepted conversations be sealed under the direction of a judge "[i]mmediately upon the expiration of the period of the [electronic surveillance] order, or extensions thereof." 18 U.S.C. 2518(8)(a). The presence of a seal, "or a satisfactory explanation for the absence thereof," is "a prerequisite for the use" of the tape recordings at trial. *Ibid.* The question in this case is whether tapes that have been sealed, although not immediately, may be admitted into evidence at trial if the government shows that the integrity of the tapes has been maintained.[9] The district court held that, regardless of the

[9] Because the district court declined to make a finding as to the integrity of the Levittown tapes, the district court will have to make such a finding on remand if the government prevails in this Court. The district court, however, has already made a finding that there was no tampering with or alteration of the Vega Baja telephone tapes. Pet. App. 30a n.3, 45a.

integrity of the Levittown and Vega Baja tapes, they had to be suppressed solely because of the delay in sealing. The court of appeals held that those tapes had to be suppressed because the government's explanation for its failure to seal the tapes immediately was not satisfactory, and that suppression was required even if the tapes were conclusively shown to be unaltered.

1. Although both courts based their decisions on Section 2518(8)(a) of Title III, the statutory sealing provision, nothing in that provision requires suppression of evidence because of a delay in sealing. The statute provides that either a seal or a satisfactory explanation for its absence is a "prerequisite" for the use of tape-recorded electronic surveillance evidence at trial; however, the statute says nothing about the consequences of a delay in sealing. Under the statute's plain terms, a "satisfactory explanation" is a prerequisite for admission of the evidence only where the seal is absent; there is no such requirement where the seal is present but the actual sealing was delayed for some period after the termination of the interception.

The Second Circuit, in *United States* v. *Gigante,* 538 F.2d 502, 506 (1976), held that the requirement of a "satisfactory explanation" applies to a delay in sealing as well as to the absence of a seal. According to that court, the statutory reference to the absence of a seal must be interpreted to mean the absence of a seal affixed in a timely manner.

That construction of Section 2518(8)(a) is strained and implausible. Under the natural reading of the statute, the "absence" of the "seal provided for by this subsection" simply means the absence of a judicial seal, regardless of

when the seal was attached. If Congress had meant to include promptness in sealing as a prerequisite for admissibility, it could have done so explicitly, but it did not. Accordingly, if the seal is absent, then the tapes may not be used unless the government provides a satisfactory explanation for the seal's absence; if the seal is present, however, Section 2518(8)(a) poses no bar to admission of the evidence.[10]

In this case, the Levittown and Vega Baja tapes were sealed long before trial, and thus the statutory prerequisite was satisfied. Consequently, the exclusionary provision in Section 2518(8)(a) does not bar admission of those tapes at trial.

2. The structure of Title III rebuts any notion that Section 2518(8)(a) contains an implied suppression remedy for delays in sealing tape-recorded evidence. Congress drafted Title III in an effort to provide a statutory means for conducting electronic surveillance consistent with Fourth Amendment standards enunciated by the Court in *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v.

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[10] Nothing in the legislative history of Section 2518(8)(a) suggests that it was intended to apply to delays in sealing as well as the absence of a seal. The sealing provision was not the subject of much attention during the drafting of Title III, and the references to the statute in the legislative history tend to confirm that the exclusionary language in the statute was meant to apply only to cases in which there is no seal or satisfactory explanation for the absence of a seal. See S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968) ("the presence of the seal, noted above, is intended to be a prerequisite for use or disclosure • • • unless a satisfactory explanation can be made"). Senator Scott's contemporaneous explanation of Title III is consistent with that interpretation. See Scott, *Wiretapping and Organized Crime*, 14 How. L.J. 1, 25 (1968), *reprinted in* 114 Cong. Rec. 13,210 (1968) ("Unless under seal (or no satisfactory explanation of its absence) the information contained in such recording may not be used in any court or other proceeding.").

United States, 389 U.S. 347 (1967). See S. Rep. No. 1097, 90th Cong., 2d Sess. 27-28, 66-76 (1968). To enforce the privacy protections in the statute, Congress drafted a suppression remedy similar to the Fourth Amendment exclusionary rule. *Id.* at 96. Specifically, Section 2515 excludes intercepted conversations from evidence "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under Section 2515 are, in turn, enumerated in Section 2518(10)(a):

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

See *United States* v. *Donovan*, 429 U.S. 413, 432 (1977). This remedy extends only to those statutory provisions that protect privacy interests by limiting the use of electronic surveillance. *United States* v. *Donovan*, 429 U.S. at 435; see *id.* at 433-434 (quoting *United States* v. *Giordano*, 416 U.S. 505, 527 (1974) ("suppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device' ")).

Applying that principle, this Court has held that suppression is inappropriate for violations such as (1) misidentification of the authorizing Department of Justice official in the warrant application, *United States* v. *Chavez*, 416 U.S. 562, 570-580 (1974); (2) failure to list in the application every individual whose conversations the government expects to intercept, *Donovan*, 429 U.S. at 435-437; and (3) failure to inform the authorizing judge of all identi-

fiable persons whose conversations were intercepted. *Id.* at 438-439.

Like other post-interception procedures, the sealing requirement does not limit the conduct of electronic surveillance. Because it does not restrict the circumstances in which conversations can be seized, the sealing provision does not affect any interest protected by the Fourth Amendment.[11] A lack of compliance with a post-interception procedure does not mean that particular conversations were illegally seized. *Donovan,* 429 U.S. at 438. Therefore, lawfully intercepted tapes are not subject to suppression under 18 U.S.C. 2518(10) for a delay in sealing. See *United States* v. *Falcone,* 505 F.2d at 484.

The fact that Section 2518(10) does not authorize the exclusion of evidence for sealing delays sheds light on the proper construction of Section 2518(8)(a). It is most unlikely that Congress, having expressly defined the scope of the suppression remedy in Section 2518(10), intended to

[11] The court of appeals asserted that the government's delay in sealing the Vega Baja public telephone tapes demonstrated "an underlying cavalier conception that the sealing requirements are technical, rather than reflective of congressional concerns about underlying constitutional requirements." Pet. App. 14a. The length of the delay, however, resulted not from any "cavalier conception" of the sealing requirement, but simply from the failure to predict that the court would refuse to treat the subsequent authorizations for tapping the same phones as extensions of the original authorization (see pp. 9-10, *supra*). Moreover, the court's assumption that the sealing provision was imposed to satisfy some constitutional requirement is simply incorrect. Only the pre-intercept procedures implement the Fourth Amendment standards identified in *Berger* and *Katz*. Neither Congress nor any court other than the Second Circuit has ever suggested that there is a constitutional basis for the sealing requirement. Thus, even if the government erred in failing to seal immediately, the error did not deprive respondents of any constitutional right or any statutory right that was created to protect constitutional interests.

expand that remedy by implication in Section 2518(8)(a).[12] Interpreting Section 2518(8)(a) to require the suppression of unaltered tapes solely because of delays in sealing would 'inexplicably elevate[ ] the immediate sealing requirement to a more protected status than any of the other procedural requirements enacted in Title III." *United States* v. *Angelini,* 565 F.2d at 473 n.7.[13]

Contrary to the court of appeals' assertion (Pet. App. 6a), this interpretation does not "completely undercut the statutory purpose of protecting the integrity of the tapes." Under the Federal Rules of Evidence, the proponent of evidence always has the burden of establishing the authenticity of physical evidence offered for admission. See Fed. R. Evid. 901. Moreover, where questions have been raised as to the integrity of tape-recorded evidence, the courts of appeals have required the government to meet a strict standard of proof in establishing the authenticity of the tapes, quite apart from any requirement of Title III. See *United States* v. *Sandoval,* 709 F.2d 1553, 1554-1555

[12] In 18 U.S.C. 2518(8)(c), Congress provided an express remedy of contempt of court for any violation of Section 2518(8). It is unlikely that after creating an express remedy for all violations of that subsection, Congress intended to create by implication a different remedy for some violations of the same subsection.

[13] The suppression of tapes because of delays in sealing cannot be defended as an exercise of the court's supervisory powers. A court may not disregard the limits on a statutory or constitutional remedy simply by invoking supervisory power. See *United States* v. *Hasting,* 461 U.S. 499, 506 (1983); *United States* v. *Payner,* 447 U.S. 727, 734 (1980). Thus, the Second Circuit was wrong in *United States* v. *Massino,* 784 F.2d 153, 158-159 (1986), to invoke the supervisory power to establish an elaborate set of procedures and remedies for sealing delays, under which tape-recorded evidence must be suppressed in some instances simply because of the length of the delay, regardless of the reason for the delay or the strength of the showing that the tapes are unaltered.

(D.C. Cir. 1983); *United States* v. *Blakey*, 607 F.2d 779, 787 (7th Cir. 1979); *United States* v. *King*, 587 F.2d 956, 960-961 (9th Cir. 1978); *United States* v. *Biggins*, 551 F.2d 64, 66-68 (5th Cir. 1977); *United States* v. *Starks*, 515 F.2d 112 (3d Cir. 1975); *United States* v. *Knohl*, 379 F.2d 427, 440 (2d Cir.), cert. denied, 389 U.S. 973 (1967). It is therefore not necessary to torture the language of Section 2518(8)(a) to ensure that tape-recorded evidence is admitted only if it is shown to be genuine.

II. TAPE-RECORDED EVIDENCE SHOULD BE ADMISSIBLE IF THE COURT IS SATISFIED THAT THE EVIDENCE IS AUTHENTIC

Even if the "satisfactory explanation" requirement applies to delays in sealing (as well as the absence of a seal), suppression should be ordered only if the delay draws into question the integrity of the tape-recorded evidence. That is, a "satisfactory explanation" for a delay in sealing should be any explanation that satisfies the court that the delay did not result in tampering with the tapes. See, *e.g.*, *United States* v. *Lawson*, 545 F.2d 557, 564 (7th Cir. 1975) (although the government proffered an "untenable" reason for the delay, suppression was not ordered where the integrity of the tapes was safeguarded prior to sealing), cert. denied, 424 U.S. 927 (1976).

Most courts agree that, regardless of the reason for the delay, late-sealed tapes are admissible if the government shows that they have not been altered. See, *e.g.*, *United States* v. *Angelini*, 565 F.2d 469, 473 (7th Cir. 1977) (admitting tapes because the "Congressional purposes underlying the sealing requirement were met"), cert. denied, 435 U.S. 923 (1978); *United States* v. *Diadone*, 558 F.2d 775, 780 (5th Cir. 1977) (no suppression where no showing that "the integrity of the interceptions was in any way disturbed"),

cert. denied, 434 U.S. 1064 (1978); *United States* v. *Lawson*, 545 F.2d at 564 (no suppression despite 57-day delay where the integrity of the tapes is not questioned); *United States* v. *Cohen*, 530 F.2d 43, 46 (5th Cir.) (no suppression for five-week delay where "the parties stipulated to facts showing chain of custody and lack of alteration of the tapes"), cert. denied, 429 U.S. 855 (1976); *United States* v. *Sklaroff*, 506 F.2d 837, 840-841 (5th Cir.) (no suppression where the purpose of "safeguard[ing] the recordings from editing or alteration" is satisfied), cert. denied, 423 U.S. 874 (1975); *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974) (admitting late-sealed tapes "where the trial court has found that the integrity of the tapes is pure"), cert. denied, 420 U.S. 955 (1975); *United States* v. *Vastola*, 670 F. Supp. 1244, 1282 (D.N.J. 1987) (suppression is not mandated where the "integrity of the tapes has not been questioned"). Cf. *McMillan* v. *United States*, 558 F.2d 877, 879 (8th Cir. 1977) (refusing to consider collateral attack alleging sealing delay since defendant did not challenge the integrity of the tapes). But see *United States* v. *Mora*, 821 F.2d 860, 867-868 (1st Cir. 1987) (although the court looks "first – and most searchingly – at whether the government has established by clear and convincing evidence that the integrity of the tapes has not been compromised," nevertheless "warranties of driven snow purity, proven beyond peradventure, will not suffice to constitute a 'satisfactory explanation' "); *United States* v. *Massino*, 784 F.2d 153, 158-159 (2d Cir. 1986) (suppression appropriate for delay in sealing regardless of the effect of the delay on the integrity of the tapes).

The principal purpose of Section 2518(8)(a) is to ensure the integrity of evidence obtained through electronic surveillance. See S. Rep. No. 1097, *supra*, at 104 ("Paragraph (8) sets out safeguards designed to insure that accurate records will be kept of intercepted communications."). In

addition to the sealing requirement, Section 2518(8)(a) requires that the contents of intercepted conversations be recorded, if possible; that the recording "be done in such way as will protect the recording from editing or other alterations"; that custody of the original tapes be maintained in a place that the court directs; and that the original tape recordings be preserved for at least ten years. The sealing requirement is therefore simply one of several devices Congress chose to ensure the integrity of evidence produced by electronic surveillance. See *United States* v. *Mora*, 821 F.2d 860, 867 (1st Cir. 1987); *United States* v. *Diana*, 605 F.2d 1307, 1314 (4th Cir. 1979), cert. denied, 444 U.S. 1102 (1980); *United States* v. *Lawson*, 545 F.2d 557, 564 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *United States* v. *Falcone*, 505 F.2d 478, 483 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).[14]

Because Section 2518(8)(a) creates an evidentiary rule designed to ensure the integrity of evidence, it would be perverse to order suppression in a case in which the tapes were shown to be authentic, simply because the procedures followed in that case might result in an increased risk of tampering in other cases. This Court has noted in other contexts that the suppression of relevant evidence "exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case." *United States* v. *Payner*, 447 U.S. 727, 734 (1980). For that reason, the Court has held that the drastic sanction of suppression ordinarily should not be

[14] The sealing provisions—and particularly Section 2518(8)(b)—serve the related subsidiary purpose of protecting information in the tapes from disclosure to unauthorized persons. S. Rep. No. 1097, *supra*, at 105. That purpose is fully accomplished by careful custodial procedures of the sort utilized by the FBI in this case. Pet. App. 30a-36a. There is no suggestion that the sealing delays led to any unauthorized disclosure in the instant case.

imposed in the absence of a violation of the defendant's own rights. *Id.* at 735-736. See also *United States* v. *Morrison*, 449 U.S. 361 (1981). To suppress evidence where there has been no violation of any right of the defendant, *i.e.*, where it is clear that the evidence at issue is untainted, would extend the evidentiary rule in Section 2518(8)(a) beyond the reach of both the Fourth Amendment exclusionary rule and the parallel statutory exclusionary rule in Section 2518(10)(a) of Title III.

For that reason, tape-recorded evidence should not be suppressed simply to deter future statutory violations. If, as we submit, a "satisfactory explanation" for a sealing delay is an explanation that gives the court confidence in the integrity of the tapes, it would be an extravagant application of exclusionary rule principles to suppress trustworthy evidence on the ground that admitting such evidence might encourage sealing delays in future cases.

Besides being inconsistent with general exclusionary rule principles, the cost of deterrence in this setting would far exceed any potential benefits. While sealing delays have occurred on occasion, there is no indication in court decisions or otherwise that the government routinely violates Section 2518(8)(a) or has used periods of delay for improper purposes. It would be inappropriate to create a rule excluding trustworthy evidence because of sealing delays when there is no evidence that the government has flouted Section 2518(8)(a) for the purpose of altering tapes.[15]

Finally, there is no need for deterrence in this setting. The reason is that the requirement that the government prove the tapes' authenticity already provides a substantial

[15] We are not aware of any case in which a court has found that federal prosecutors or agents have intentionally altered tape recordings of electronic surveillance.

deterrent to delay. The government is unlikely to delay sealing deliberately where the predictable result of such delay is precisely what happened here—a complex, lengthy hearing on the integrity of the tapes. Submitting tapes for judicial sealing is quick and easy. Thus, to the extent that that procedure obviates or simplifies any hearing on the tapes' authenticity, the government will have a great incentive to ensure that the tapes are sealed promptly.

The principal factor that led to the suppressions at issue here was the length of the delays involved.[16] But that factor should be irrelevant if the government shows that the integrity of the tapes was maintained throughout the period of the delay. Although a lengthy delay may increase the opportunities for alteration, the length of the delay loses it significance once the government satisfies the district court that no one took advantage of that opportunity and that the accuracy of the tapes was in fact preserved. Accordingly, even a lengthy delay should not require suppression as long as the tapes are unaltered.[17]

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[16] Although the court of appeals disavowed (Pet. App. 11a-12a) the district court's conclusion that suppression was required solely on the basis of the length of the delay, it nonetheless found the length of the delay highly significant. Thus, the court suppressed the Levittown tapes but suggested that the same mistake of law might constitute a satisfactory explanation for the delay in sealing the El Cortijo tapes (Pet. App. 13a) even though the only arguably relevant difference between the suppressed Levittown tapes and the admitted El Cortijo tapes is the length of the delays in sealing. See also *United States* v. *Kusek*, 844 F.2d 942, 946-947 (2d Cir. 1988) (refusing to suppress tapes when eight-day delay was due to prosecutor's misunderstanding of the statutory requirement); *United States* v. *Rodriguez*, 786 F.2d 472, 477 (2d Cir. 1986) (same, 14-day delay). In addition, the Levittown and the El Cortijo tapes were afforded identical protections against tampering, and samples of the Levittown tapes were included in those subjected to expert analysis and found to be unaltered. Pet. App. 45a; Gov't C. A. App. 161-162.

[17] The act of sealing provides, at best, only a modest degree of protection against tampering. Someone intent on tampering with the tapes can do so at any time prior to the expiration of the electronic surveillance order or its extensions, when the sealing obligation accrues. Because the seal hardly provides full protection against tampering, it is particularly perverse to impose a rigid suppression remedy in the case of anything more than a short delay in sealing following the expiration of the last extension order.

Because the purpose of the sealing requirement is to ensure the authenticity of tape-recorded evidence, suppression likewise should not be ordered simply because a court in a particular case does not regard the government's reason for failing to arrange for timely sealing as a good one. Whether the failure to seal immediately is due to negligence, oversight, or a misunderstanding of the statutory requirement, the authenticity of the intercepted conversations is not impaired as long as adequate measures have been taken to protect the tapes from unauthorized handling. The reason for the delay is relevant only if the conduct of the person responsible for sealing bears on the ultimate question whether the tapes accurately reflect the intercepted conversations, *e.g.*, if the government delayed in bad faith for the purpose of tampering with the tapes. In the absence of any such showing, a court should not predicate admissibility on its sympathy with the government's reason for the error.

III. THE TAPE-RECORDED EVIDENCE IN THIS CASE SHOULD BE ADMITTED EVEN IF SECTION 2518(8)(a) REQUIRES THE GOVERNMENT TO SHOW GOOD CAUSE FOR THE DELAY IN SEALING

Even if this Court construes Section 2518(8)(a) to require the government to provide a "satisfactory explanation" for the delay in sealing, and even if the Court concludes that a "satisfactory explanation" requires more than a showing that there was no bad faith or tape tampering,

the tapes in this case should not have been suppressed. Thus, even if Section 2518(8)(a) imposes the equivalent of a "good cause" standard, that standard was met in this case.

The reason for the sealing delays was that supervising attorney Frank Bove believed that sealing was not legally required until all the related interception orders and extensions for each target were completed. Neither delay was the result of procrastination on the part of the supervising attorney or a deliberate decision to ignore the sealing requirement. Rather, with respect to both the Levittown tapes and the Vega Baja public telephone tapes, Bove concluded that the authorizations for those interceptions were "extended," and that conclusion led him to postpone having the tapes sealed for several months while the surveillance of targets of the two series of intercept orders continued.

Whether or not attorney Bove reached the wrong conclusion as to the meaning of the sealing requirement in Section 2518(8)(a), his legal conclusion certainly constitues an adequate explanation for the delays and thus should not give rise to suppression.[18] Bove was aware of the sealing requirement and he fully intended to comply with it. J.A. 4-5, 24-28. Moreover, in light of the case law at the time, Bove's legal conclusions regarding the time for sealing the Levittown and Vega Baja tapes were reasonable, even though they may have been wrong.

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[18] We are not here challenging the decision of both lower courts that the El Cortijo surveillance was not an extension of the Levittown surveillance and that the March 1 Vega Baja telephone order was not an extension of the previous order. Accordingly, we accept for the sake of argument the district court's calculations of the sealing delays.

Section 2518(8)(a) imposes no sealing requirement until the expiration of the order authorizing electronic surveillance "or any extensions thereof." With respect to the Levittown tapes, the question Bove faced was whether the El Cortijo order was an "extension" of the Levittown order, thereby postponing the obligation to seal the Levittown tapes. In *United States* v. *Principie*, 531 F.2d 1132, 1142 & n. 14 (2d Cir. 1976), cert. denied, 430 U.S. 905 (1977), the Second Circuit construed the identical language in Section 2518(8)(d), which identifies the time at which the obligation to serve an inventory notice ripens.[19] In *Principie*, as in the instant case, the targets of the surveillance had changed locations to evade detection. The Second Circuit held that the order authorizing electronic surveillance at the second location was an "extension" of the order for the first location, which had the effect of postponing the commencement of the period for serving an inventory notice with respect to the conversations intercepted at the first location. Consequently, Bove's construction of the statutory language was similar to the Second Circuit's construction in *Principie*. In light of *Principie*, there was a legal basis for his view; even if that view was incorrect, it was not unreasonable. Accordingly, the Second Circuit's criticism (Pet. App. 12a) of Bove's interpretation of the statute (as resulting from "a disregard of the sensitive nature of the activities undertaken") is both unfair and misguided. At worst, Bove made an "honest mistake." See *United States* v. *Mora*, 821 F.2d at 869. Under any standard, Bove's legal error should constitute a "satisfactory explanation" for the delay in sealing the Levittown tapes.

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[19] An inventory notice must be served "not later than ninety days after * * * the termination of the period of an order or extensions thereof." 18 U.S.C. 2518(8)(d).

The argument against suppression is even more compelling with respect to the Vega Baja public telephone tapes. Both courts below agreed that the March 1, 1985, order was an "extension" of the earlier order, which expired on February 17, because it covered the "same telephones, concerned the same crimes, and targeted the same individuals as the initial order." See Pet. App. 82a-83a, citing *United States* v. *Vazquez*, 605 F.2d 1269, 1278 (2d Cir. cert. denied, 444 U.S. 981 (1979). See also Pet. App. 13a-14a. But the courts held that the government had failed to give a satisfactory explanation for the 12-day delay in obtaining the extension. Yet, Title III does not require the government to explain the hiatus between the expiration of an order and the authorization of an extension, and it is unclear why a second intercept order should be considered an "extension" if the government has a satisfactory explanation for a brief hiatus following the first order, but not an "extension" if the explanation is deemed unsatisfactory. Certainly, Bove cannot be faulted for failing to anticipate that the Second Circuit would find the difficulties in revising the Title III affidavit to be an insufficient justification for the delay in obtaining an extension order, thereby retroactively triggering the sealing requirement.

The court of appeals' criticism of the government's conduct in this case is difficult to justify where, in an earlier decision, the court required no explanation for a 23-day hiatus between the expiration of an order and the subsequent extension. See *United States* v. *Scafidi*, 564 F.2d 633, 641 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978). The court in *Scafidi* rejected an argument that conversations intercepted pursuant to the initial order should have been sealed when that order expired, holding that sealing was required "only at the conclusion of the whole surveillance." *Ibid.* The reason for the different result in this case is difficult to ascertain. Instead of applying

Scafidi, the court of appeals affirmed the suppression order in this case because the revision of the affidavit could have been completed more "expeditiously," and it characterized the government's lack of speed as demonstrating "an underlying cavalier conception" of the sealing requirements. Pet. App. 14a. In fact, however, the 12-day hiatus in the Vega Baja interception occurred because the Office of Enforcement Operations within the Department of Justice was attempting to revise the lengthy affidavit that was being used to apply for authorizations and extensions. Pet. App. 79a-80a. That hiatus was thus attributable not to carelessness or indolence on Bove's part, but to the close scrutiny that Title III applications receive within the Department of Justice. The Department's deliberateness serves a two-fold purpose: it curtails needless invasions of privacy and prevents the later suppression of the evidentiary fruits of the surveillance. These purposes should be encouraged, not discouraged. Cf. *United States* v. *MacDonald*, 456 U.S. 1, 11 n.12 (1982) (the decision to seek an indictment should be considered carefully and delay resulting from the care given to this matter "is certainly not any indication of bad faith or deliberate delay"); *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966) (no constitutional requirement that an arrest be effected as soon as law enforcement officials have probable cause). And, of course, the 12-day delay in approving the application for extension of the Vega Baja public telephone wiretaps does not reflect in any way upon the government's subsquent efforts to comply with the immediate sealing requirement.

In sum, the Second Circuit has suppressed evidence in this case (1) in the absence of a finding that the tapes have been altered, (2) in the absence of any constitutional violation, and (3) in the absence of bad faith on the part of the government. Suppression of evidence under those circum-

stances finds no support in the text or the policies underlying Title III.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

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UNITED STATES OF AMERICA,

Petitioner,

vs.

FILIBERTO OJEDA RIOS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the evidentiary exclusion of certain Title III recordings, pursuant to 18 U.S.C. §2518(8)(a), where the government: (1) failed to submit those recordings for judicial sealing for several months; and (2) provided no satisfactory explanation for such failure.

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STATEMENT OF FACTS

The respondents in this case are nine Puerto Rican nationals who are committed to obtaining independence for their country. They were arrested at their homes in Puerto Rico on August 30, 1985, in a pre-dawn operation conducted by the F.B.I. with the assistance of the United States military. At the time of the arrests, more than three dozen searches were carried out on the island, involving homes and offices of many unindicted individuals.

After being presented in the federal district court in San Juan, the respondents were removed from Puerto Rico by military aircraft and taken to a secret location in the United States. Neither their lawyers nor their families were advised of their whereabouts until they appeared in the district court in Hartford on September 3, 1985.[1]

Prior to the arrests of the respondents, the government had conducted a massive, 17-month electronic surveillance investigation in Puerto Rico. More than 1,000 recordings were generated and eventually presented for judicial sealing. The surveillance orders covered eight

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[1] These nine respondents are among 19 individuals who were indicted in connection with the robbery of a Wells Fargo depot in West Hartford, Connecticut, on September 12, 1983. It is undisputed that the robbery, in which no one was injured, was carried out by Wells Fargo guard Victor Gerena. The government's allegations against these nine defendants, all of whom were living and working in Puerto Rico at the time of the robbery, are that they aided and abetted the robbery, and/or participated in the alleged transportation of stolen money from the United States to Mexico.

separate locations, including private residences, businesses, private and public telephone lines, and an automobile. A special prosecutor from the Department of Justice, Frank Bove, was sent to Puerto Rico to oversee the electronic surveillance investigation.

The first electronic surveillance order, which targeted a private residence and a bank of three public telephones in Levittown, Puerto Rico, was issued on April 27, 1984. Two extensions were obtained, in May and June, 1984. The final extension order expired on July 23, 1984. However, both the residence and telephone surveillance actually terminated two weeks earlier, on July 9, six days after defendant Ojeda-Rios moved out of the apartment. None of the Levittown tapes were judicially sealed until October 13, 1984, 96 days after the surveillance ended and 82 days after the final extension order expired. These tapes were ordered excluded by the district court, and that decision was affirmed by the court of appeals. Pet.App. 12a, 69a.

On January 18, 1985, the government obtained an order authorizing wiretaps of two public telephones in Vega Baja, Puerto Rico. The order expired on February 17, 1985. A new wiretap order was obtained on March 1, 1985. Subsequently, two extensions were granted and the final order expired on May 30, 1985. All of the Vega Baja telephone tapes were judicially sealed on June 15, 1985. The district court ruled that the March 1, 1985 order was not an extension of the January 17th order, and found the delay in sealing the first set of Vega Baja telephone tapes to be 118 days. Those tapes were ordered excluded by the district court, and the order was affirmed by the court of appeals. Pet. App. 13a-14a, 83a.

While none of the other electronic surveillance recordings were excluded, the district court ruled that the government failed to immediately seal the tapes from all but one other surveillance location.[2] The court found: (1) sealing of the Taft Street and El Cortijo telephone wiretaps was delayed for 19 days, Pet. App. 75a; (2) sealing of the Vega Baja residence tapes was delayed for 15 days, Pet. App. 79a; and (3) sealing of the El Centro Condominium tapes was delayed for 14 days, Pet. App. 92a-93a.

The government offered a single explanation for its failure to immediately seal the Title III recordings excluded by the lower courts. With respect to the Levittown tapes, Supervisory Attorney Frank Bove swore in an affidavit dated December 31, 1986, that he delayed sealing the Levittown tapes for three months after the final extension order expired, relying on his belief that judicial sealing could be deferred until "there occurred a meaningful hiatus in [the government's] authority to intercept communications [at any location] . . . ." J.A. 5. The same excuse was put forward in an effort to explain the

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[2] The district court ruled that the only tapes timely sealed by the government were those intercepted from a Datsun Sentra automobile. Pet. App. 69a. The record is clear, however, that no conversations were recorded for the 71 days preceding the sealing, and none of the named targets were observed near the Datsun during that time period. Pet. App. 71a-72. Thus, substantial doubt remains regarding the timeliness of the sealing of those tapes, as well.

government's delay in sealing the first set of Vega Baja telephone tapes. J.A. 6-7.[3]

SUMMARY OF THE ARGUMENT

There is no dispute that 18 U.S.C §2518(8)(a) expressly requires that all Title III recordings be sealed immediately upon the expiration of each electronic surveillance order, or extension thereof. It is also undisputed that §2518(8)(a) contains an independent exclusionary remedy, which applies whenever the judicial seal required by the statute is absent, unless the government provides a satisfactory explanation. The government's claim, unsupported by any clear precedent, that the exclusionary remedy expressly contained within §2518(8)(a) applies only to unsealed tapes, ignores the plain language of the statute and settled rules of statutory construction. Section 2518(8)(a) is the only provision of Title III which contains its own, independent exclusionary remedy. To distort its plain meaning by limiting the remedy only to unsealed tapes would lead to absurd results that Congress did not intend. The government's invitation to this Court to rewrite this express statutory

[3] Bove also offered an alternative excuse for the Vega Baja delay, asserting that time was needed for the Justice Department to submit a "revised and expanded affidavit" to the issuing judge. J.A. 7. The government ultimately conceded, however, that the "revised and expanded" affidavit was not, in fact, submitted in support of the March 1, 1985 application, as claimed by Bove. Gov. C.A. Br. 9-10.

requirement ignores the fundamental principles of separation of powers and judicial restraint. This Court should affirm the ruling of the court below that immediate sealing (or a satisfactory explanation for noncompliance) is a prerequisite to the evidentiary use of Title III recordings (pp. 6-16).

The statutory requirement that the government provide a satisfactory explanation for tardy judicial sealing is not met by proof of tape authenticity. The statute provides the government with two alternative vehicles for compliance: (1) immediate sealing; or (2) a satisfactory explanation for the failure to do so. The government's effort to designate proof of tape integrity as an additional exception to the statutory exclusion remedy is antithetical to fundamental rules of statutory construction, and impinges upon the exclusive domain of Congress. The adequacy of the government's explanation properly depends upon an evaluation of all relevant factors which shed light on *why* the government failed to immediately seal the tapes. That was the approach employed below (pp. 17-31).

The ruling by the court of appeals that no satisfactory explanation was provided for the egregious delays in sealing at issue here is fully supported by the record. The government intentionally decided not to seal hundreds of tapes for several months, ostensibly based upon a legal theory unsupported by the statute itself, any precedent, or even common sense. The proffered "explanation" is, in reality, a *post hoc* justification which has changed over time. Faced with repeated violations of the sealing provisions, the district court excluded only a limited portion of the wiretap evidence. That determination, which was

upheld on appeal, should not be disturbed. The totality of the circumstances here, including the extraordinary delays, the repeated nature of the statutory violations, and the lack of any reasonable explanation offered by the government, fully justifies exclusion of the tapes at issue (pp. 32-40).

Finally, even if the explanations for late sealing offered by the government could pass muster, there are substantial reasons to doubt their veracity. The evidentiary record reveals that the reel-to-reel recordings which were eventually sealed do not reflect the entirety of the government's electronic eavesdropping campaign. F.B.I. monitoring agents also secretly employed independently-operated cassette recorders which could and did record material not appearing on any sealed tape. Moreover, F.B.I. agents admitted to having engaged in the unlawful practice of eavesdropping without recording during the course of this investigation. Under the circumstances, the government's self-serving excuses for violating §2518(8)(a) should be approached with great skepticism (pp. 40-49).

ARGUMENT

I. ELECTRONIC SURVEILLANCE RECORDINGS ARE SUBJECT TO EXCLUSION UNDER 18 U.S.C. §2518(8)(a) WHEN THE GOVERNMENT VIOLATES THE STATUTORY REQUIREMENT OF IMMEDIATE SEALING.

A. The Immediate Sealing Provision of Title III.

Following extensive legislative study and debate, Congress enacted Title III of the Omnibus Crime Control

and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, as a comprehensive scheme governing the use of electronic eavesdropping by law enforcement agencies. The statute was explicitly designed to meet the constitutional objections to unregulated electronic surveillance articulated by this court in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967). S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in 1968 U.S. Code Cong. and Ad. News*, 2112, 2153. *See also United States v. Donovan*, 429 U.S. 413, 426-427 (1977). The drafters of the statute were also concerned with safeguarding the integrity of electronic surveillance recordings following their creation. *United States v. Mora*, 821 F.2d 860, 867 (1st Cir. 1987); *United States v. Gigante*, 538 F.2d 502, 503 (2d Cir. 1976). Title III contains myriad specific requirements to serve these legislative purposes.

The statutory provision at issue here reads, in pertinent part, as follows:

> Immediately upon the expiration of the period of the order [authorizing electronic surveillance], or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions . . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

It is undisputed that this provision requires the government to seal its Title III recordings "immediately." The parties disagree, however, over whether or not §2518(8)(a) prescribes any remedy for noncompliance

with that directive. The court of appeals held, and respondents agree, that the statute mandates the exclusion of electronic surveillance recordings for a violation of the immediate sealing requirement unless the government offers a satisfactory explanation for its failure to comply. Pet. App. 6a. The government now argues for the first time that the statute provides *no* remedy for a failure to seal immediately, irrespective of the duration of delay or the reasons for noncompliance.[4] Resolution of this clear dispute depends upon a proper application of settled principles of statutory construction.

B. The Plain Language of §2518(8)(a) Renders Compliance with the Immediate Sealing Requirement, Or a Satisfactory Explanation for Non-Compliance, A Prerequisite to the Evidentiary Use of Title III Recordings.

The first rule of statutory construction is that the plain language of an enactment is ordinarily controlling. Courts should refrain from looking any further where the statutory language is clear. *United States v. Locke*, 471 U.S. 84, 95-96 (1985). An "extraordinary showing of contrary intentions" manifested by legislative history is required

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[4] It is noteworthy that the government made no such contention in either the district court or the court of appeals. This court ordinarily refrains from deciding legal issues neither raised nor adjudicated below. *See, e.g., Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The government's belated argument should be dismissed on that ground alone.

to justify departure from the plain language of a statute. *United States v. Albertini*, 472 U.S. 675, 680 (1985).[5]

The statutory subsection at issue here, 18 U.S.C. §2518(8)(a), first requires that Title III recordings be judicially sealed "immediately" and then establishes "the presence of the seal provided for by this subsection" as a "prerequisite" for the evidentiary use of such recordings. There is nothing ambiguous about either the meaning of these two statutory provisions or their interrelationship within the same subsection of Title III. The latter, remedial provision simply dictates the consequences of noncompliance with the former, substantive requirement.

The government's fanciful suggestion that these two parts of the subsection are entirely unrelated defies logic and language. It is not the presence of any seal, but rather *"the seal provided for by this subsection,"* which constitutes a prerequisite for admissibility. The latter provision expressly incorporates the former by reference. *United States v. Gigante*, 538 F.2d at 506. The government would simply read that internal reference out of the statute entirely.

The sole requirement of judicial sealing specified by the statute is that it be accomplished "immediately." It is

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[5] A review of the legislative history of Title III, including the relevant committee reports and floor debates, reveals nothing to suggest that Congress intended that the plain language of the immediate sealing provision be disregarded in construing the statute. Thus, the Court must rely upon the words of the statute and, if necessary, upon the principles of statutory construction discussed *infra* at pp. 10-16 to resolve any ambiguity.

not simply sealing, but rather *immediate* sealing, which is "provided for by this subsection." Thus, according to the plain language of §2518(8)(a), noncompliance with the immediate sealing requirement, absent a satisfactory explanation, mandates the exclusion of Title III recordings at trial. The government's argument to the contrary, devoid of linguistic or precedential support of any kind, should be rejected.

C. Other Established Tools of Statutory Construction Confirm that Immediate Judicial Sealing, Or a Satisfactory Explanation for Delay, Is a Prerequisite to the Admission of Title III Recordings.

Where the plain language of a statute is inconclusive, a reviewing court employs traditional aids of statutory interpretation in an effort to glean its intended meaning. *Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 13 (1981). In the instant case, the plain language of the statute is sufficient to belie the government's position. In any event, the following rules of statutory construction compel the same result:

(1) A statute should generally be construed so that no portion of the enactment will be rendered meaningless or superfluous, *Mountain States Telephone Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985);

(2) Inclusion of particular language in one statutory section, but not in another, is presumed to be intentional, *Russello v. United States*, 464 U.S. 16, 23 (1983);

(3) Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions

are not to be implied in the absence of clearly contrary legislative intent, *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617 (1980); and

(4) A statute should not be construed in a manner which produces absurd results, *United States v. Turkette*, 452 U.S. 576, 580 (1981).

An application of these principles to the statutory provision at issue here confirms the direct relationship between the immediate sealing requirement of §2518(8)(a) and its explicit, self-contained exclusionary remedy for noncompliance. The phrase "provided for by this subsection," describing the seal required as a prerequisite for admissibility, should be afforded some meaning. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (courts have a duty "to give effect, if possible, to every clause and word of a statute"). The government's interpretation of the statute would render that language a nullity. In the government's stated view, the presence of *any* seal affixed at *any* time would presumably suffice. That is not what the statute says or what it should be presumed to mean. *United States v. Gigante*, 538 F.2d at 506 (government's interpretation "completely elides the statutory requirement of a 'seal *provided for by this subsection*' ") (emphasis in original).

Moreover, while Title III contains a plethora of specific requirements governing the authorization and conduct of electronic surveillance, §2518(8)(a) is the only substantive provision which carries its own explicit

exclusionary remedy for noncompliance.[6] The inclusion of such a remedial provision in the sealing subsection of the statute should not be presumed unintentional. On the contrary, it serves to underscore the importance Congress attributed to protecting the integrity of electronic surveillance tapes. *See Russello*, 464 U.S. at 23.

It is inconceivable that Congress would have gone to the special lengths of engrafting an express exclusionary provision onto §2518(8)(a) if all that was required to circumvent that remedy was to slap a seal on the tapes at some point prior to their introduction into evidence. Such a formalistic exercise would do nothing to safeguard the integrity of Title III recordings, nor would it serve to reduce the opportunity for tampering. Moreover, since Congress specifically provided that the government could avoid exclusion of late-sealed tapes if it provided a satisfactory explanation for noncompliance, it should not be implied that Congress intended, in the alternative, that the government could also avoid exclusion by obtaining a tardy seal at any time, regardless of the extent or cause of its noncompliance.[7] *See Andrus v. Glover Construction Company*, 446 U.S. at 616-17.

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[6] The government maintains, Gov. Br. 18, and respondents agree, that the statute's general suppression provision (18 U.S.C. §2518(10)(a)) does not apply to a delay in judicial sealing of electronic surveillance tapes. Thus, either the specific exclusionary language of §2518(8)(a) applies to unexcused delays in sealing or else there is no statutory remedy for such violations.

[7] Indeed, the government's interpretation would also render the satisfactory explanation requirement of §2518(8)(a) virtually meaningless. If all that the government must do to avoid

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The government's tortured construction of §2518(8)(a) would produce absurd results antithetical to the legislative intent of the statute. If, as the government maintains, compliance with the immediate sealing requirement is not a prerequisite for admissibility, that statutory directive can be blithely ignored with impunity. According to the government, §2518(8)(a) does not preclude the admission of Title III recordings as long as some seal is affixed on or before the date such recordings are offered into evidence. No matter how protracted the delay or how lame the government's excuse for noncompliance, all would be forgiven and made right through a belated sealing ceremony. Such an interpretation would transform the immediate sealing requirement into a toothless admonition and undermine the legislative purpose of reducing the opportunities for tampering with electronic surveillance recordings. Such an absurd result, which clearly contravenes congressional intent, should not be imputed to the statute. *See United States v. Turkette*, 452 U.S. at 580.

The nature, purposes, and history of Title III lend further support to respondents' position that unexcused noncompliance with the immediate sealing requirement carries the consequence of evidentiary exclusion under

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exclusion of late-sealed tapes is to get those tapes sealed at some point before offering them into evidence, it need never bother to explain its failure to fulfill the statutory requirement. That cannot be what Congress had in mind in carefully crafting the provisions of Title III.

§2518(8)(a). Both Congress and this Court have emphasized that the specific requirements enumerated in Title III are to be strictly enforced. Senator McClellan, the statute's chief sponsor in the Senate, remarked during legislative debate:

> [A] bill as controversial as this . . . requires close attention to the dotting of every 'i' and the crossing of every 't' . . . .
>
> 114 *Cong. Rec.* 14751 (1968).

In his concurring opinion in *United States v. Donovan*, 429 U.S. 413, 441 (1977), Chief Justice Burger described the statute as having been drafted "with exacting precision." Earlier, in *United States v. Giordano*, 416 U.S. at 505, 515 (1974), Justice White, writing for the majority, noted the "considerable detail" in Title III, evincing the "clear intent" of Congress that electronic surveillance be used with restraint. In *United States v. Chavez*, 416 U.S. 562, 580 (1974), this Court admonished the government to maintain "strict adherence" to the requirements of Title III. Viewed against this backdrop, the government's current reading of §2518(8)(a), which would divorce the immediate sealing requirement from the express enforcement mechanism set forth within the very same subsection, appears particularly strained and implausible.

Since the government's peculiar interpretation of the sealing provision is belied by its plain language and the application of settled rules of statutory construction, it is hardly surprising that no court which has construed § 2518(8)(a) shares the government's view. Indeed, every single court which has addressed the issue to date has agreed that an unexplained delay in sealing must be treated as equivalent to an absent seal for purposes of

§2518(8)(a). *E.g. United States v. Mora*, 821 F.2d at 864-865 (government's interpretation would lead to "outlandish results" and would be "tantamount to urging law enforcement to go through the essentially empty charade of making returns hopelessly out of time in order to thwart what Congress, in enacting § 2518(8)(a), manifestly intended to accomplish"); *United States v. Massino*, 784 F.2d 153, 156 (2d Cir. 1986); *United States v. Johnson*, 696 F.2d 115, 124 (D.C. Cir. 1982).[8]

Close scrutiny of the government's effort to eviscerate the immediate sealing provision of Title III by jettisoning its enforcement mechanism reveals it to be based upon nothing more than a bald assertion that excluding late-sealed tapes amounts to poor public policy. Gov. Br. 18-20, 22-24. In effect, the government is asking this Court to rewrite §2518(8)(a) under the guise of "construing" the statute in order to better serve the government's own objectives. Such an argument is offensive to the separation of powers which undergirds our political system. As this court observed in *T.V.A. v. Hill*, 437 U.S. 153, 197 (1978):

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the

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[8] Other courts have implicitly rejected the government's vacuous position, by holding that a satisfactory explanation existed for late-sealed tapes. *E.g. United States v. Diana*, 605 F.2d 1307 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *United States v. Angelini*, 565 F.2d 469, 471 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). Had any of these courts adopted the government's approach, the issue of satisfactory explanation need never have been reached.

> process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

In fact, the immediate sealing requirement and accompanying exclusionary provision of §2518(8)(a) do serve the intent of Congress by significantly reducing the opportunities for tampering and by helping to protect the integrity of Title III recordings. The point of the provision is to put such tapes under direct judicial supervision as quickly as possible, thus reducing the risk of tampering. It is self-evident that the longer such tapes remain outside the purview of judicial supervision via sealing, the greater the danger of adulteration. *United States v. Mora*, 821 F.2d at 868. Immediate judicial sealing acts as a readily-enforceable, prophylactic safeguard against improper editing or other alteration of electronic surveillance tapes. *United States v. Johnson*, 696 F.2d at 124; *United States v. Gigante*, 538 F.2d at 505.

Yet even if the government's critique of §2518(8)(a) were well-founded, its frontal assault on the plain language and meaning of the statute would not belong in this or any other court. The government is free to propose modifications of the sealing provision of Title III to Congress, which enacted the statute in 1968. Unless and until Congress sees fit to amend this carefully crafted legislation, however, it should be interpreted in accordance with its plain language and applicable principles of statutory construction, and enforced as such. This Court should affirm the court below in holding that compliance with the immediate sealing requirement is a prerequisite for the evidentiary use of Title III recordings.

II. THE STATUTE MANDATES EXCLUSION OF LATE-SEALED TAPES WHEN THE GOVERNMENT PROVIDES NO SATISFACTORY EXPLANATION FOR ITS VIOLATION, WHETHER OR NOT THERE IS PROOF OF TAMPERING.

The second dispute between the parties respecting the proper construction of §2518(8)(a) is over the meaning and application of the sole enumerated exception to the statutory exclusion of late-sealed tapes. According to the express terms of the statute, a "satisfactory explanation" by the government for its noncompliance renders the exclusionary provision inapplicable. The court of appeals held, and respondents agree, that this excusatory phrase requires the government to justify its tardiness in submitting Title III recordings for judicial sealing, based upon the totality of the circumstances, in order to avoid exclusion. Pet. App. 12a. The government disagrees, maintaining that evidence which persuades a reviewing court that late-sealed tapes have not been tampered with should necessarily be deemed to constitute a satisfactory explanation under §2518(8)(a), regardless of the duration of delay or why it occurred. Gov. Br. 24-25.

A. The Plain Language of the Statute and Established Principles of Statutory Construction Compel Rejection of the Government's Argument.

The short answer to the government's position that evidence of tape integrity is the equivalent of a "satisfactory explanation" for failure to comply with the immediate sealing requirement is that that is not what the statute

says. The statute explicitly requires "a satisfactory explanation for the absence" of an immediate judicial seal. The statute calls upon the government to explain its reasons for noncompliance, without regard to the authenticity of the tapes. If Congress had meant to say that tapes need not be excluded for violations of the immediate sealing requirement absent proof of tampering, it could easily have explicitly enacted such an additional exception. Instead, Congress legislated only one means for the government to avoid exclusion of late-sealed tapes—by providing a satisfactory explanation for noncompliance. The government's attempt to rewrite the statute under the guise of construing its clear language should be rejected.[9]

Even if the statutory language were ambiguous, the application of settled rules of statutory construction would compel the same result. In essence, the government's argument is that absent evidence of actual tampering, a violation of the immediate sealing requirement amounts to harmless error, not warranting the consequence of evidentiary exclusion. This policy argument utterly ignores the fact that Congress reached a contrary conclusion by electing to include an express exclusionary rule within the sealing provision of Title III. *See Russello*, 464 U.S. at 23.

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[9] The government here expounds a novel approach to statutory construction, arguing that it was "inappropriate to create a rule" such as that explicitly embodied in §2518(8)(a). Gov. Br. 23. Such a decision, of course, is within the exclusive purview of Congress. *T.V.A. v. Hill*, 437 U.S. at 197.

Moreover, the government's position violates the principle that where Congress enumerates a specific exception to a general rule, additional exceptions are not to be implied absent clear legislative intent. *Andrus v. Glover Construction Co.*, 446 U.S. at 616-617. Here, Congress provided the government a specific means of avoiding the harsh result of evidentiary exclusion--proof of a satisfactory explanation for noncompliance with the immediate sealing requirement. The government now seeks to add a second escape route--proof of tape integrity. The statute contains no such provision, and the government offers no evidence that Congress intended that one be imputed.

Finally, the government's "construction" of §2518(8)(a) would essentially strip that statutory provision of its substance and function. The government argues that evidence of the satisfactory explanation required by the statute is equivalent to the evidence which must be presented by the proponent of any real evidence under Rule 901 of the Federal Rules of Evidence. Gov. Br. 19-20. Of course, no real evidence may be admitted at trial unless its authenticity or integrity can be established. If that is all Congress meant in adding an exclusionary provision to the sealing subsection of Title III, however, that provision would be entirely superfluous. The government's argument would relegate Title III recordings to the status of any other real evidence

offered at a trial.[10] Yet Congress devoted a detailed, comprehensive statute to the regulation of electronic surveillance alone, including a specific provision requiring immediate judicial sealing and mandating exclusion for noncompliance, in the absence of a satisfactory explanation. The government's attempt to reduce that provision to a nullity should be rejected.

B. The Function of §2518(8)(a) as a Readily-Enforceable Means of Reducing the Risk of Tape Tampering Would be Undermined by the Government's Interpretation.

In establishing a requirement of immediate judicial sealing backed by an exclusionary provision for noncompliance, Congress did not completely eliminate the possibility that electronic surveillance tapes could be tampered with. By limiting the time the tapes are outside judicial supervision, however, the statute reduces the opportunity for, and hence risk of, tampering. *United States v. Donlan*, 825 F.2d 653, 657 (2d Cir. 1987); *Note*, "Evidence – Admissibility of Wiretap Recordings After Delayed Judicial Sealing," 22 SUFFOLK U.L. REV. 218, 227 (1988). Indeed, even the government concedes that "[a] lengthy delay

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[10] Prior to the passage of Title III, numerous decisions required the government to establish the authenticity of any tape recording offered into evidence. *E.g. United States v. Knohl*, 379 F.2d 427, 439-41 (2d Cir. 1967); *United States v. Madda*, 345 F.2d 400, 402-03 (7th Cir. 1965). In interpreting a statute, it can always be assumed that Congress knew the law, including judicial interpretations, which existed at the time the statute was passed. *Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979). Viewed in this context, the government's claim that Congress intended that §2518(8)(a) require only proof of authenticity, *i.e.*, the integrity of the tapes, is unsupportable.

[in sealing] may increase the opportunity for alteration . . . ." Gov. Br. 24. Like a traffic light installed at a dangerous intersection, the sealing requirement serves a valuable prophylactic function, whether or not disaster ensues on any particular occasion.

The government's proposal that late-sealed tapes be deemed admissible absent proof of actual tampering would effectively replace a readily-enforceable, external requirement with an evidentiary contest over tape integrity. Such a drastic shift in emphasis, predicated upon neither the language of the statute nor its legislative history, ignores the technical feasibility of tape tampering as well as the substantial practical obstacles to detecting such alterations. In the name of public policy, the government would needlessly and unjustifiably transform the nation's trial courts into stages for expensive, protracted, and inconclusive battles among audio engineers and other technical experts.

The mechanics of recording conversation or other sounds onto magnetic tape are neither novel nor particularly complicated. A signal transducer, usually a microphone, is employed to convert an acoustic signal electromechanically into an electrical signal.[11] Weiss and

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[11] Much of the technical information set forth in this portion of respondents' brief is derived from a study by the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance. Weiss and Hecker, "The Authentication of Magnetic Tapes: Current Problems and Possible Solutions," published in *Commission Studies* (1976). The Commission, which was established by Congress in

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Hecker, *supra*, at 227. A transmitter or other intervening device processes the electrical signal into a "record signal." *Id*. That signal is then captured and preserved on magnetic tape through the medium of a tape recorder. *Id*.

While the creation of tape recordings is readily accomplished, so is the falsification of such tapes. Tape recorded evidence is "uniquely susceptible to manipulation and alteration." *United States v. Gigante*, 538 F.2d at 505. *See also Lopez v. United States*, 373 U.S. 427, 468 (1963) (Brennan, Douglas, and Goldberg, JJ., dissenting) ("Far from providing unimpeachable evidence, the devices lend themselves to diabolical fakery"). As Weiss and Hecker observe:

> Tapes that are made for use in criminal investigations can be falsified, even by relatively unskilled persons, in ways that are superficially convincing. The necessary equipment is readily available, and the necessary techniques are easily learned.

Weiss and Hecker, *supra*, at 237. They conclude that "[i]t appears to be impossible to prevent tampering with tapes." *Id*. at 238.

There are four basic varieties of tape falsification: deletion, obscuration, transformation, and synthesis. *Id*. at 222. Deletion includes editing the contents of a tape by

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§804 of Title III, 82 Stat. 223-25, filed its final report with Congress in 1976. The study by Weiss and Hecker has been described as "an exhaustive survey of the art concerning the authentication of magnetic tapes for legal purposes." *United States v. Johnson*, 696 F.2d 115, 124 (D.C. Cir. 1982).

erasure, splicing, or similar means. A skillful forger can avoid telltale signs of such editing. *Id*. at 223. Obscuration involves the weakening or distorting of recorded material. According to Weiss and Hecker, "[i]f it is done well, falsification involving obscuration is much more difficult to detect and prove than falsification involving deletion." *Id*. Transformation is a type of tampering whereby portions of a recording are changed or rearranged to alter the meaning of the recorded material. *Id*. at 224. The fourth variety of tampering, synthesis, involves the generation of a recording that is "wholly artificial." *Id*. According to Weiss and Hecker, "[i]t is relatively easy to add background noises to an existing speech recording and thereby alter the apparent circumstances under which it was made." *Id*.

Most tape recordings manifest certain irregularities which may be attributed either to tampering or to an entirely innocent cause. *Id*. at 237. Tapes may contain "gaps," "transients," "fades," "equipment sounds," "extraneous voices," and other "information inconsistencies." *Id*. at 220-221. A gap in a recording is a segment in which the character of the recorded material changes abruptly. The gap may be as brief as a thousandth of a second. *Id*. at 220. Transients are abrupt sounds of short duration, usually lasting less than one-tenth of a second. *Id*. A fade is a reduction in the strength of the recording. A recording may also contain other inexplicable sounds, voices, or inconsistencies, which may be suggestive of tampering. *Id*. at 221. It is impossible for a judge or juror, lacking expertise in acoustical engineering, to determine by examining or listening to a tape recording whether or not it has been altered. *Id*. at 218.

A wide array of testing mechanisms has been employed by experts engaged in forensic examination of tapes. They include: (1) use of an oscillograph to provide a graphic record of the electrical signal over time; (2) spectral analysis, revealing the distribution of the playback signal over the audio frequency range; (3) magnetic development, measuring the distribution of magnetic field variations of the tape; (4) flutter measurements, measuring the frequency modulation of tones present in background noise; and (5) analysis of magnetic start and stop marks on the tape. *Id.* at 227-231. *See also* "The EOB Tape of June 20, 1972," *Report on a Technical Investigation Conducted for the United States District Court for the District of Columbia by the Advisory Panel on the White House Tapes* (May 31, 1974) at 8-20 (detailed report chronicling the expert examination of the infamous White House tape containing an eighteen-and-one-half minute gap).

Technical limitations often prevent these tests from generating meaningful results. As Weiss and Hecker explain, "[t]he effectiveness of the analytical approach depends almost entirely on the availability of factual information about the acoustic sources, the original signal transducer, the original intervening equipment, the original tape recorder, the original tape, and the original recording." Weiss and Hecker, *supra*, at 233. Where the original components of the recording system are unavailable for examination and details relating to the manner in which that system was operated are unknown, "even the most powerful analysis techniques become inapplicable, and the examination may prove inconclusive." *Id.* at 220. Even where the original components and technical data

are still available for analysis, a forensic examiner typically does not have access to all of the equipment necessary to perform all of the testing desired in a particular case. Instruments capable of performing flutter measurements, for example, are extremely expensive and not generally available. *Id.* at 234.

Most significantly, from the standpoint of a criminal justice system operating with limited human and financial resources, forensic examination of tape-recordings is an extremely time-consuming and expensive task. The testing itself can take weeks and even months. *United States v. Johnson*, 696 F.2d at 124. Evidentiary hearings at which each side's experts present and defend their respective findings can go on even longer. In the instant case, the evidentiary hearings on respondents' motion to exclude the Title III recordings on various grounds commenced on September 1, 1987, and continued, virtually uninterrupted, until May 4, 1988. J.A. 1. Hundreds of thousands of dollars in public funds were expended to pay both the government's and respondents' experts for the time they spent carrying out forensic testing and testifying in court.[12]

Yet even an unlimited expenditure of time and money will probably not produce a definitive expert

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[12] The respondents, all of whom were adjudicated indigent by the district court, were entitled to necessary expert services under the Criminal Justice Act. 18 U.S.C. §3006A(e)(1). Few criminal defendants are likely to possess the financial wherewithal to purchase the services of an acoustical engineer qualified to examine tape recordings for signs of tampering.

opinion that a tape-recording has or has not been tampered with. A well-done forgery may remain undisclosed despite extensive testing. Weiss and Hecker, *supra*, at 225. Most tapes can neither be conclusively authenticated nor shown conclusively to have been falsified. *Id.* at 237. The ease of tampering, coupled with the difficulties of detection and conclusive authentication, renders the courtroom battle between tape experts an inefficient and ineffective means of assuring the integrity of electronic surveillance recordings.

If adopted by this Court, the government's reconstruction of §2518(8)(a) would require trial courts to engage in time-consuming, expensive battles between acoustical experts debating the likely significance of various gaps, marks, and glitches found on electronic surveillance recordings.[13] The instant case provides an instructive example of how unsuited our trial courts are to such contests. After many months of testimony and hundreds of thousands of dollars in expert fees, the most the government's acoustical engineer was able to say in defense of the more than one thousand electronic surveillance tapes proffered by the government was that nine of

[13] If, as the government insists, the sole relevant issue is whether or not tampering has occurred, then it would always be necessary (in any case involving Title III tapes not immediately sealed) to provide indigent defendants with the expert resources required to test electronic surveillance tapes for tampering and to expend significant judicial resources to adjudicate the facts in dispute. The economic and institutional costs inherent in such a process are virtually incalculable. If defendants are to be denied such expert services, they will be unable to test the authenticity of the government's recordings. That would reduce the "contest" over tampering to a sham, formalistic ceremony with a pre-ordained result.

the ten he looked at appeared to be authentic. The expert, Ernest Aschkenasy, explicitly refused to extrapolate from his findings regarding nine tapes to the authenticity of the remaining tapes. J.A. 63-64. The trial court declined to make any findings regarding the integrity of the Levittown tapes at issue here. Pet. App. 30a, n.3.

It would be illogical, at the very least, to presume that Congress explicitly established a readily-enforceable requirement of immediate sealing to safeguard the integrity of electronic surveillance tapes and then implicitly authorized the substitution of a costly, protracted, inconclusive battle of expert witnesses. It is precisely because the opportunity for tampering is so great and detection so difficult that the immediate sealing requirement and its accompanying exclusionary provision must be enforced according to its terms, regardless of whether or not actual tampering can be shown. *United States v. Massino*, 784 F.2d at 156.

In enacting Title III, Congress gave the government license to employ electronic surveillance as an investigative tool, subject to carefully-prescribed limitations and procedures. That license carries with it a commensurate responsibility—to strictly comply with the key provisions of Title III. The timely sealing of tape recordings in compliance with §2518(8)(a) is readily accomplished by a competent prosecutor. Where the government fails to fulfill that explicit statutory obligation and can provide no satisfactory explanation for its failure to do so, the tapes must be excluded. That statutory remedy fulfills the purpose of Congress in limiting the opportunity for tampering and safeguarding the integrity of electronic surveillance recordings, without interfering in any way

with the government's ability to employ electronic eavesdropping as an effective law enforcement weapon.[14]

C. Contrary to the Government's Claims, The Enforcement of §2518(8)(a) According to its Terms Does Not Produce Unreasonable or Perverse Results.

The government suggests that if the immediate sealing requirement and its accompanying exclusionary provision are enforced according to its terms, the system of criminal justice will suffer. Gov. Br. 22-23. Yet §2518(8)(a), as enacted, contains an escape clause which permits the government to introduce its late-sealed tapes into evidence as long as it can provide a satisfactory explanation for its tardiness. In practice, the lower courts have been quite generous in approving a wide bevy of excuses put

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[14] The government's argument that its reformulation of the excusatory provision of §2518(8)(a) better serves the purposes of Title III is not only specious, but also beside the point. As this Court recently observed:

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." '
>
> *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (citations omitted).

forward by the government in different circumstances. *E.g. United States v. Mora*, 821 F.2d at 870 (20 and 41-day delays do not mandate suppression; state prosecutor preoccupied with unrelated trials and failed to understand responsibilities); *United States v. Robinson*, 698 F.2d 448, 453 (D.C. Cir. 1983) (*per curiam*) (four-day delay; government's explanation sufficient where reason offered was need to duplicate tapes and perform other wiretap responsibilities in same case); *United States v. Massino*, 784 F.2d at 156 (15-day delay; government's decision to investigate leak of confidential information in same case constitutes satisfactory explanation). Indeed, the exclusion of late-sealed tapes has been upheld on appeal in only one case, other than this one, since Title III was enacted in 1968. *United States v. Gigante*, 538 F.2d at 507. It is only the extreme case, like this one, which triggers the exclusionary remedy built into the statute.[15]

The lower courts which have carefully analyzed the satisfactory explanation requirement have applied a flexible, broad-based test, taking into account the totality of circumstances in determining whether or not the government's explanation for noncompliance with the immediate sealing requirement should be deemed "satisfactory." In analyzing why the government failed to comply with the immediate sealing requirement, these courts have assessed a number of factors, including: the duration of

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[15] Under the government's interpretation, late-sealed tapes would *never* be subject to exclusion under §2518(8)(a), no matter how many months or years the tapes remained unsealed and regardless of whether the tardiness came about deliberately or in bad faith.

delay; the diligence of law enforcement in completing the pre-sealing tasks; the frequency (in a case involving multiple wiretap orders) of violations of the immediate sealing requirement; the nature of the circumstances, if any, which diverted those responsible from the presentation of the tapes for immediate sealing; evidence of any prejudice caused to defendants by the delay in sealing; and evidence of any bad faith by the government. *See, e.g., United States v. Rodriguez*, 786 F.2d 472, 477 (2d Cir. 1986); *United States v. Johnson*, 696 F.2d at 124-125.[16]

Such a standard provides an appropriately flexible vehicle for applying the provisions of §2518(8)(a) in each particular case. There is no basis, in law or in logic, for replacing this broad set of criteria with the time-consuming, costly, and inconclusive debate over tampering proposed by the government.[17]

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[16] Not all of the above factors are always relevant, nor is the list above all-inclusive. For example, affirmative evidence of tampering present in a particular case could shed light on the government's actual motive for noncompliance. While tampering is typically listed as a factor to consider, the totality of the circumstances approach affords the lower courts the discretion to first consider the government's reasons for delay, without resorting to the costly and inconclusive battle of the experts required by the government's approach.

[17] Respondents recognize that several courts of appeals have addressed the issue of tampering in ruling on the exclusion of late-sealed tapes. *E.g. United States v. Diana*, 605 F.2d 1307, 1314-1316 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *United States v. Falcone*, 505 F.2d 478, 484 (3rd Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); *United States v. Sklaroff*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975); *United States v.*

(Continued on following page)

Yet even if the explicit exclusionary remedy set forth in the statute could be debated on policy grounds, the government's position on that issue is entirely irrelevant to the proper construction of the statute. *See Rodriguez v. United States*, 480 U.S. at 525-26. The Court is addressing a legislative provision here, not a judicially-crafted rule of exclusion. The only lawful vehicle for changing that provision is via legislative enactment. *See T.V.A. v. Hill*, 437 U.S. at 194-95. The government's bald suggestion that the plain language of the statute be blithely ignored would violate the constitutional doctrine of separation of powers and must be rejected.

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Angelini, 565 F.2d 469 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). None of these courts, however, resort to the "tampering only" inquiry now espoused by the government. In *Diana*, the court relied on factors other than tape integrity in deeming the government's explanation to be satisfactory, 605 F.2d at 1315. In *Falcone*, the court erroneously looked to §2518(10)(a), rather than §2518(8)(a), for legal guidance. Moreover, the Third Circuit did not suggest that factors other than tampering are irrelevant. 505 F.2d at 483. Both of these decisions contain well-reasoned dissents. 605 F.2d at 1316 (Hall, J.); 505 F.2d at 486 (Rosenn, J.). In *Sklaroff*, the Court found (1) no prejudice to the defendants, (2) the existence of an administrative explanation for the 14-day delay, and (3) no showing of any tampering. 506 F.2d at 840. Finally, in *Angelini*, the Seventh Circuit applied a two-step analysis, *i.e.*, the first inquiry is whether a satisfactory explanation is shown, and the second is an examination of the integrity of the tapes. To the extent that these decisions could be read as focusing on tape integrity as a substitute for a satisfactory explanation, they find no support in the language of the statute or governing principles of statutory construction.

III. THE GOVERNMENT'S EXPLANATION FOR ITS FAILURE TO COMPLY WITH THE IMMEDIATE SEALING REQUIREMENT WAS NOT SATISFACTORY.

A. The Levittown Orders.

After weighing the totality of relevant circumstances, the court of appeals concluded that the government's explanation for its protracted delay in sealing the Levittown tapes was unsatisfactory. "The failure to seal the Levittown tapes here," the court found, "resulted from a disregard of the sensitive nature of the activities undertaken . . . ." Pet. App. 12a. A review of the evidentiary record supports the lower court's finding and compels affirmance of the exclusion order.

The explanation for late sealing offered by the government was the putative belief of Supervisory Attorney Frank Bove that judicial sealing could be deferred until there was some "meaningful hiatus" in the government's overall use of electronic surveillance in the course of investigating these defendants.[18] J.A. 5. Since Bove claimed that all such electronic surveillance, irrespective of targets or location, was "interrelated and part of the same investigation," J.A. 4, he felt free to put off sealing the tapes recorded at the Levittown location as long as eavesdropping elsewhere was authorized or in

[18] In his sworn affidavit, Bove stated his belief that judicial sealing could be deferred as long as the government had *legal authority* to conduct electronic surveillance at some location. J.A. 5. When he testified, he modified his position, stating that he believed the government was not obligated to seal Title III recordings as long as it had the *physical capability* to conduct eavesdropping at some location. J.A. 25-26.

progress.[19] Bove's decision to postpone sealing was thus deliberate, and not due to oversight or accident.

Bove acknowledged that there was no legal authority extant in 1984 supporting his novel interpretation of the sealing requirement. J.A. 41. Indeed, all such authority was to the contrary. *E.g. United States v. Vasquez*, 605 F.2d 1269 (2d Cir.), *cert. denied*, 444 U.S. 981 (1979); *United States v. Angelini*, 565 F.2d at 470. Bove testified that he referred to a number of documents in formulating his sealing theory, including the statute itself, a Department of Justice monograph prepared by Attorney William Corcoran, materials published in the *Georgetown Law Journal* and a treatise by Fishman entitled *Wiretapping and Eavesdropping*. J.A. 23-24, 35. Bove conceded, however, that none of these sources supported his sealing theory, and admitted that the section of the Fishman treatise dealing with sealing was directly to the contrary. J.A. 40-43. When confronted with this conflict, and asked if he had read the section, Bove testified: "I don't recall specifically. Apparently not, or else I would have given some second thoughts as to what I did." J.A. 43.

As the Justice Department attorney in charge of the Title III operation, Bove had a professional obligation to

[19] Bove's theory was exemplified by the following testimony:

> Q: If you had had continuing authority and capacity to intercept from April 27, 1984, through and including August 30, 1985, no sealing would have been required prior to August 30, 1985, correct.
>
> A: Yes.
>
> (10/27/87 Tr. 194).

ascertain the requirements of law respecting the sealing of recorded tapes. If Bove was not sure what immediate sealing meant, he should have consulted the considerable body of relevant caselaw, all of which directly contradicted his own legal theory about sealing. He should have consulted with his colleagues in the Department of Justice, many of whom had experience in Title III investigations and were presumably aware that §2518(8)(a) meant what it said, even if Bove was not. Indeed, he should have read the Fishman treatise, which he claims to have looked at, but which flatly rejects his purported justification for postponing the sealing of the Levittown tapes. Bove took none of these elementary steps to perform his important job.

His decision to rely upon his novel and legally-unsupported theory as to when sealing could properly be accomplished can fairly be characterized as a deliberate decision to ignore the law. In the criminal arena, such deliberate ignorance is generally deemed equivalent to actual knowledge of illegality. *E.g. United States v. Picciandra*, 788 F.2d 39, 46 (1st Cir. 1986); *United States v. Hanlon*, 548 F.2d 1096, 1101 (2d Cir. 1977). Bove's conduct fell far short of what is minimally required by law. Willful disregard of the requirements of law, especially by a public official, cannot be rewarded with the appellation of "satisfactory explanation." As the Court of Appeals wryly observed:

> The privacy and other interests affected by the electronic surveillance statutes are sufficiently important, we believe, to hold the Government to a reasonably high standard of at least acquaintance with the requirements of law.
>
> Pet. App. 12a.

To credit the government's flimsy excuse for the egregious sealing delay in this case would be to sanction an unacceptably low standard of conduct for government attorneys supervising extremely sensitive investigations.

Faced with the clear inadequacy of Bove's "explanation" for failing to seal the Levittown tapes for some three months, the government has resorted in this Court to mischaracterizing the record in an effort to substitute a more palatable excuse. In its brief, the government claims that Bove "believed that sealing was not legally required until all the related interception orders and extensions *for each target* were completed" (emphasis supplied). Gov. Br. 26. In addition, the government alleges that Bove concluded that the authorizations for the Levittown interceptions were "extended," thus justifying his decision to "postpone" sealing the tapes. *Id.* This rewriting of the record enables the government to argue that "the question Bove faced was whether the El Cortijo order was an 'extension' of the Levittown order," within the meaning of §2518(8)(a).[20] *Id.* at 27.

Whatever possible merit could be ascribed to this hypothetical extension theory for delaying the Levittown sealing, it was never adopted by Bove. As detailed above, Bove claimed to believe judicial sealing could be put off as long as electronic surveillance was authorized or proceeding at *any* location in the course of the overall investigation. He never purported to base his deliberate decision upon a belief that the El Cortijo/Taft Street

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[20] The government concedes on this appeal that the El Cortijo surveillance order was not, in fact, an "extension" of the Levittown order. Gov. Br. 26, n.18.

eavesdropping order constituted an "extension" of the Levittown orders within the meaning of §2518(8)(a).[21]

Indeed, the government never even claimed below that Bove believed the El Cortijo order was an "extension" of the Levittown orders. Gov. D.Ct. Br. 97; Gov. C.A. Br. 18. Rather, the government made the *legal* argument that the El Cortijo surveillance should be deemed an extension of Levittown. Gov. C.A. Br. 19-28. It is that legal argument, rejected by the courts below and now abandoned by the government, Gov. Br. 26, n.18, that has somehow been transformed into the imaginary *factual* underpinning of the government's most recent explanation for late sealing.

The court of appeals properly analyzed the satisfactory explanation issue in terms of the testimony of the government prosecutor who made the sealing decision, rather than on the basis of a legal argument first made by government attorneys four years later. Pet. App. 12a. The evidence in the record strongly supports the ruling below that the explanation given was not satisfactory. The only excuse put forward by Bove for the delay in sealing the Levittown tapes was his ill-conceived theory. There is no

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[21] Thus, the government's discussion of *United States v. Principie*, 531 F.2d 1132, 1142 and n.14 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977), is entirely inapposite. There is no evidence in the record that Bove even read the case, much less relied on it. Neither it nor any other reported case, treatise, or manual supports in any way Bove's ill-conceived claim that all orders in a multi-location electronic surveillance operation are interrelated for sealing purposes.

evidence that the delay was caused by shortages of personnel, administrative obstacles, or unanticipated emergencies. There is and was no legal support for Bove's theory. Thus, it cannot be considered objectively reasonable.

The shortcomings of the government's explanation for sealing the Levittown tapes some three months too late are compounded by other government misfeasance which characterized the investigation in this case. Apart from the late-sealed Vega Baja telephone tapes, discussed at pp. 37-40, *infra*, the record reveals that Title III recordings obtained from a number of other locations were also sealed late. *E.g.* Pet. App. 75a (19-day delay in sealing Taft Street tapes; 19-day delay in sealing El Cortijo tapes); Pet. App. 79a (15-day delay in sealing Vega Baja residence and remaining telephone tapes); Pet. App. 92a-93a (14-day delay in sealing El Centro tapes). Thus, the particular delays which resulted in exclusion of the recordings at issue here were merely the most egregious instances of noncompliance, rather than isolated peccadilloes. Indeed, the government was fortunate that the district court applied the satisfactory explanation standard leniently and agreed to admit the remaining late-sealed tapes into evidence. The order of the district court, excluding the Levittown tapes, upheld by the court of appeals, should be affirmed.

B. Vega Baja Telephones.

The only Vega Baja recordings excluded below were those created pursuant to a judicial order which expired by its terms on February 17, 1985. Those tapes were

sealed on June 15, 1985, 118 days later.[22] The government offered two explanations for this protracted delay. First, as with the Levittown tapes, Supervisory Attorney Bove claimed he believed he could defer sealing as long as electronic surveillance was going on elsewhere. J.A. 6-7, 27-28. Second, the government claimed that the hiatus between the expiration of the first Vega Baja wiretap order on February 17 and the issuance of a subsequent order on March 1 was necessitated by the decision to "extensively expand and revise the affidavit that was to

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[22] As the court of appeals pointed out, a central issue with respect to the Vega Baja tapes is whether the government satisfactorily explained its failure to seal between February 17 and March 1, 1985. Pet. App. 14a. While the delay in sealing was 118 days in duration, the government's principal transgression was in failing to seek an extension order for twelve days after its initial wiretapping authorization expired. That period of delay in seeking an extension order contrasts markedly with the three months the government avoided sealing the Levittown tapes.

In reviewing the totality of the circumstances, however, the court of appeals had before it evidence that Bove had relied on his unsupportable legal theory that interrelated orders in this investigation delayed the sealing requirement (*see* pp. 33-39, *supra*), and had also proffered a factually inaccurate excuse for his late sealing of the Vega Baja tapes—the preparation of a revised and expanded affidavit in support of continued wiretapping. J.A. 6-7; Pet. App. 14a. The court also properly considered the Vega Baja sealing delay as part of a pattern of such delays in this investigation, reflecting the government's insensitivity to the importance of complying with this specific requirement of Title III. Those additional factors buttress the decision of the court of appeals to affirm the exclusion of the Vega Baja tapes, as well as those recorded at Levittown.

accompany the application for renewal." J.A. 7. Both of these excuses were properly rejected by the courts below.[23]

As demonstrated above, Bove's fanciful deferral theory of judicial sealing was completely devoid of legal support. He utterly failed to undertake basic steps to ascertain and apply the relevant law in carrying out his responsibilities to supervise this sensitive investigation. Under the circumstances, the court of appeals' conclusion that the delay in sealing the Vega Baja tapes stemmed from "an underlying cavalier conception that the sealing requirements are technical, rather than reflective of Congressional concerns about underlying constitutional requirements," Pet. App. 14a, was clearly warranted. The government's second explanation for late-sealing was equally deficient. While Bove's affidavit asserted that the "revised and expanded affidavit was presented to Chief Judge Perez Gimenez on March 1, 1985," J.A. 7, the government was compelled to concede in the court of appeals that the revised and expanded affidavit was not, in fact, submitted until March 31, 1985. Gov. C.A. Br. 9-10. Thus, the government's alternative excuse for its lengthy delay in sealing the Vega Baja wiretap tapes at issue here

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[23] Unfortunately, in seeking to buttress its argument, the government once again mischaracterizes the record in this case, by erroneously claiming that both courts below agreed that the March 1, 1985 order was an "extension" of the earlier order. Gov. Br. 28. In fact, exactly the contrary holding was made by both lower courts. Pet. App. 83a ("the Court does not view the March 1, 1985 order as an extension of the January 18, 1985 order"); Pet. App. 14a ("we agree with this conclusion . . . ").

must be deemed unsatisfactory. The decision of the lower courts to exclude those tapes should be affirmed.

IV. NUMEROUS CIRCUMSTANCES SURROUNDING THE F.B.I.'S INVESTIGATION IN THIS CASE CAST DOUBT UPON THE VERACITY OF THE GOVERNMENT'S EXPLANATIONS FOR LATE SEALING.

As demonstrated above, the government's proffered excuses for late sealing, even if believed, are unsatisfactory, and were properly rejected by the court of appeals. Yet, the veracity of those *post hoc* excuses is itself open to substantial doubt. The government's widespread overreaching during its electronic surveillance investigation, including use of a secret recording system and intentional violations of Title III and court orders, all demonstrate a contempt for the rule of law.[24] The court of appeals,

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[24] It is also relevant to examine the government's asserted excuses in the context of the history of Puerto Rico and the relationship between the F.B.I. and the Puerto Rican independence movement. Since Puerto Rico was deprived of its sovereignty and converted into a U.S. colony in 1898, an ongoing campaign of repression against independence parties and organizations has been carried out. Moreover, an extensive program of political surveillance of independence activities, coupled with a formal F.B.I. counter-intelligence program, has been thoroughly documented. *See "Informe – Discrimen y Persecucion Por Razones Politicas: La Pratica Gubernmental De Mantener Listas, Ficheros y Expedientes De Ciudadanos Por Razon De Su Ideologica Politica"* (Report by Commission of Civil Rights, Commonwealth of Puerto Rico: "Discrimination and Persecution for Political Reasons: The Governmental Practice of Maintaining Lists, Files and Dossiers of Citizens for Ideological Political Reasons"). This Report is a Commonwealth of Puerto

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which accepted the government's explanations at face value and found them wanting, had no need to address these additional matters in excluding the tapes pursuant to §2518(8)(a).

A. The Government's Use of Bootleg Cassettes.[25]

For a period of almost two years preceding the arrest of the respondents, numerous F.B.I. agents were engaged in a political intelligence-gathering operation against suspected Puerto Rican independence activists, including

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Rico government study prepared in 1989 as a result of the disclosure that secret political dossiers were being maintained by the Puerto Rican police regarding pro-independence sympathizers labelled as "subversives." It provides extensive documentation of the history of political spying on pro-independence Puerto Ricans. *See also* Nelson, *Murder Under Two Flags: United States, Puerto Rico and the Cerro Maravilla Cover-Up* (1986); Gautier-Mayoral, "Notes on the Repression Practiced by the U.S. Agencies in Puerto Rico," 52 REV. JUR. U.P.R. 431 (1983). The ongoing nature of these activities was underscored by the revelation in 1988 that files had been maintained on over 130,000 alleged "subversives" who were believed to be sympathetic to the cause of Puerto Rican independence. Doctors, lawyers, teachers, trade unionists, students, and every defense attorney originally appointed in this case—many of whom had no prior contact with Puerto Rico until their appointment to represent these indigent defendants—had so-called "subversive" files maintained on them. Commission Report, pp. 266-380.

[25] The term "bootleg cassettes," used to describe cassette recordings created outside the parameters of Title III and not judicially authorized or sealed, is derived from the *Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance* (Minority Report) (1976), p. 182.

suspected members and supporters of Los Macheteros, a political organization which seeks to challenge the military, economic, and political control over the island and people of Puerto Rico by the United States government. During the course of the electronic surveillance in this case, the F.B.I. admittedly recorded several thousand hours of conversations, much of which was totally irrelevant to any criminal investigation. Many of the recordings include highly personal and private communications between parents and their children, conversations in bedrooms and bathrooms, and other matters which the government had no legitimate reason to record.[26]

The more than one thousand reel-to-reel tapes eventually sealed by the government in this case do not reveal the full extent of its electronic surveillance. In addition, the F.B.I. simultaneously employed a secret, independently-operated cassette recording system along with its

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[26] The political character of the government's agenda was further exemplified by the scope of the search warrants obtained by the government and executed at various locations throughout Puerto Rico in conjunction with respondents' arrest on August 30, 1985. While respondents were charged only with offenses relating to a specified robbery, the search warrants were framed in terms of seditious conspiracy, enabling the F.B.I. to seize every available scrap of information about the activities and beliefs of pro-independence advocates in Puerto Rico and their sympathizers. Under the rubric of "terrorist training manuals," the F.B.I. seized such documents as a speech by Pope John Paul II and a U.S. Congressional report on the Caribbean Basin Initiative. Poems, paintings, love letters, and music cassettes were taken as well. In preparation for these massive searches and arrests, the F.B.I. brought in agents from the F.B.I. "behavioral science unit" to develop "psychological profiles" of the targets, for which the agents gathered data on the personality traits and habits of the respondents.

reel-to-reel recorders. This additional eavesdropping system could and did record conversations which did not appear on any of the corresponding "original" or "duplicate original" reel-to-reel tapes.[27]

The cassette recording system had never been described to or approved by the judge supervising the Title III interceptions in Puerto Rico, United States District Court Chief Judge Perez Gimenez. 9/1/87 Tr. 252. Moreover, its existence was deliberately concealed from defense counsel and the trial court for two years after the arrests of the respondents.[28] It was finally revealed in

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[27] Special Agent Monserrate, the F.B.I. technical agent who set up the equipment, testified that the cassette recorders, separately wired to the listening devices, could record conversations even when the reel-to-reel machinery was off or "minimized," as long as the "tape/input" switch on the reel-to-reels was in the "input" position. 10/20/87 Tr. 232.

[28] On at least three occasions during the pretrial proceedings, the government took steps to conceal this separate system. First, in a memorandum dated May 2, 1984, Supervisory Agent Arthur Balizan referred to "work cassettes"; the prosecution withheld this document during two years of pre-trial discovery and revealed it only after Case Agent Jose Rodriguez revealed the existence of the secret taping system on September 1, 1987. Second, on February 26, 1986, the prosecution filed a Supplemental Response to a defense discovery request. The prosecution there acknowledged the use of cassette recorders to record conversations occurring during reel changes ("A" tapes), Def. Exh. 2416, but deliberately omitted the fact that the cassette recorders operated independently of reel-to-reel recorders and were used to record original conversations on bootleg cassettes. Finally, in October 1986, Technical Agent Monserrate prepared a draft Supplemental Response to a defense discovery request, which candidly referred to a "working copy cassette recorder" used in the surveillance operation.

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open court by the F.B.I. case agent on the first day of the electronic surveillance hearings.[29]

Unlike the reel-to-reel recordings, which the government claims to have preserved, labelled, and eventually judicially sealed, most of the bootleg cassettes were intentionally destroyed by the F.B.I., either by re-using them or by putting them through a bulk eraser. Def. C.A. App. 49-52.[30] The F.B.I. kept no written records indicating how many of these cassettes had been created, 9/1/87 Tr. 153, or what was recorded on them. 9/1/87 Tr. 101. The F.B.I. inadvertently retained a small number of the cassette recordings. These were finally disclosed to the defense, piecemeal, over a period of months during the Title III hearings.

The government's claim that the cassette recorders were simply used to make "work copy" cassettes, *i.e.*, additional copies of the material recorded on the reel-to-reels for use by the monitors and supervisory agents, is belied by the record. Of the 39 cassettes which were not

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Def. Exh. 2411. The prosecuting U.S. Attorney responsible for the case deleted this reference from the final version which was provided to defense counsel.

[29] Case Agent Rodriguez admitted that the government's widespread use of cassette recorders, ostensibly to make "work cassettes," had been deliberately concealed until that date "to keep questions from being asked about it." J.A. 14-15.

[30] The government did preserve and seal a small number of cassettes, denominated "A tapes," which were made to bridge gaps in conversations while the reels were being changed.

destroyed, four correspond to residence (as opposed to telephone) intercepts.[31] *All* of those residence cassettes contain additional "bootleg" material that does not appear anywhere on the corresponding "original" or "duplicate original" reel-to-reel tapes. Gov. Exh. 379d, f, and g; 439a.[32] It is hardly coincidental that one hundred percent of the retained residence bootleg cassettes, which were never judicially sealed, contain original intercepted communications. In fact, the secret recording system gave the F.B.I. unlimited capacity to intercept private conversations at will, without judicial oversight of any kind.

As the district court ruled, there is no way to determine how many bootleg cassettes contained original material not appearing on any sealed reel-to-reel recording, since virtually all of the cassettes were deliberately destroyed. Def. C.A. App. 62-63. The government's deliberate destruction of these cassettes severely undercut the respondents' ability to challenge the authenticity of the government's tapes, as well as the government's minimization procedures. No court is now able to determine if, and how, the cassettes were used to alter the court-authorized recordings, during the protracted period

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[31] The bootleg cassettes that correspond to telephone interceptions essentially match the corresponding reels. This is not surprising since telephone intercepts, unlike residential intercepts, were rarely minimized.

[32] In addition, two of the sealed "A tapes" for the Levittown residence had previously been used as bootleg cassettes. They too contain additional conversations not recorded on the corresponding reels. Def. C.A. App. 49-62.

preceding judicial sealing.[33] For purposes of this government appeal, the existence of such a supplemental recording system and the repeated attempts to conceal it from respondents and the district court cast doubt upon the government's self-serving excuses for late sealing.

B. Willful Violations of Title III and Court Orders.

On October 20, 1986, during the pretrial proceedings, the government solicited affidavits from the electronic surveillance monitoring agents by means of an "airtel" which informed the agents that "the defense has accused the F.B.I. of illegal arrests, illegal searches, the 'planting' and fabrication of evidence, and illegally intercepting conversations of the defendants, including the monitoring of conversations without recording, tampering of tapes and the erasure of portions of audio tapes." The airtel urged the agents to create a "basis to deny the defense motion to subpoenaing [sic] every agent." Def. Exh. 2385. Most of the monitoring agents submitted the requested affidavits.

The form affidavits provided to the agents for their signatures, signed by virtually all of the surveillance agents, contained representations that the agents "did not

[33] The district court declined to suppress all of the Title III recordings based upon the government's employment of a secret, supplemental cassette recording system. The validity of that ruling was not reached by the court of appeals on this interlocutory appeal. Nevertheless, the existence of such a recording system and the government's attempts to conceal it from respondents and the district court shed light upon the underlying objectives and character of this investigation.

alter, erase, change or tamper with any tape in my possession or control." However, when they took the witness stand, most of the agents admitted to routinely creating and destroying bootleg cassettes. Moreover, several agents admitted to listening without recording, in violation of Title III and the court orders.[34] Particularly striking in this regard was the testimony of Agents Tyler Morgan and Abelardo Alba.

Agent Morgan signed the draft affidavit attached to the October 20, 1986 airtel and had it notarized, but then crossed out his name and the name of the notary because he knew it was false to claim that he recorded all conversations he overheard. 12/4/87 Tr. 63-64. Agent Morgan testified that both he and Agent Alba had intentionally live-monitored in violation of court orders, 12/8/87 Tr. 91-92, and conceded that he "swore falsely" on his affidavit. 12/9/87 Tr. 94. Agent Alba confirmed Morgan's testimony, admitting in his affidavit dated March 16, 1987, that he listened without recording. Def. Exh. 2384-JJJ. Agent Morgan believed agents in addition to Agent Alba were live-monitoring, and he conceded that he would not have live-monitored "without believing that this was the method that others were using to monitor." 12/9/87 Tr. 54. Morgan decided not to report the live-monitoring to any F.B.I. supervisor or prosecutor, hoping

[34] Listening without recording, or "live monitoring," is a practice in which communications are intercepted and overheard by the monitoring agents, but not recorded. Such a practice violates the express requirements of §2518(8)(a) ("The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device").

that it would never be revealed. 12/6/87 Tr. 82-84. He knew that the effect of not telling any higher authority about the practice of live-monitoring was to become involved in a coverup. 12/9/87 Tr. 80-81.

As the testimony of Agents Alba and Morgan revealed, monitoring agents conducting this investigation did, in fact, engage in a practice of eavesdropping without recording, in contravention of Title III and the court orders authorizing electronic surveillance. During the course of evidentiary hearings, respondents presented detailed proof that such live monitoring was carried out on a regular basis.[35] While the district court declined to

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[35] Central to the respondents' proof of live-monitoring was extensive evidence of simultaneous matching of television and radio stations carried out by the monitoring agents at the Levittown and Vega Baja residence sites. A radio and television were connected to a reel-to-reel recorder at each monitoring location to enable the agents to attempt to determine which radio or television station was being played in the target location. Once the agents matched their station with that being overheard, background noise could later be filtered out by the F.B.I. lab. Def. C.A. App. 72-79; 9/10/87 Tr. 69. Monitors were instructed to attempt to match radio and television transmissions each time the recorders were turned on. Def. C.A. App. 79-80.

Respondents presented proof which established that, on numerous occasions, monitors managed to match stations before initiating a spot check. Thus, even though the television channel or radio station within the target residence had been changed since the prior spot check, during a period when agents claimed not to have been listening at all, the agents were miraculously able to select the same station as that of

(Continued on following page)

exclude all of the Title III recordings based upon this evidence and the court of appeals did not find it necessary to reach the issue of live-monitoring, both the practice and the government's attempt to cover it up provide a revealing context for evaluating the government's explanations for late-sealing.

In light of this record, the government's self-serving excuses for failing to seal its electronic surveillance tapes in a timely manner pursuant to statute should properly be approached with considerable skepticism. The longer judicial sealing was delayed, the greater the opportunity for tampering. To the F.B.I. and the United States government, this was not just another robbery investigation. Rather, it provided a vehicle to investigate, prosecute, and discredit the leadership of a legitimate political movement. Under the circumstances, no credible argument exists that any satisfactory explanation was offered by the government.

(Continued from previous page)

their targets, without checking the surveillance site again. For example, one agent matched the television station at the start of the intercept on eight consecutive spot checks, even though a different channel was on in the residence each time. Def. Exh. 2546. No credible explanation was offered to rebut the logical inference that the monitoring agents were listening without recording.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfuliy submitted,

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No. 89-61

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondents contend (Br. 10) that under 18 U.S.C. 2518(8)(a), "immediate judicial sealing, or a satisfactory explanation for delay" is a prerequisite to the admission of tape-recorded conversations. But that is not the language Congress used in the statute. Instead of predicating the admissibility of taped conversations on "*immediate* judicial sealing, or a satisfactory explanation for *delay*," the statute predicates admissibility on "[t]he *presence* of a seal provided for by this subsection, or a satisfactory explanation for the *absence* thereof." 18 U.S.C. 2518(8)(a) (emphasis added). The operative sentence makes no reference to immediacy or delay; instead, according to the words chosen by Congress, admissibility turns solely on the "presence" or "absence" of the seal.

Respondents argue that the "absence" of the "seal provided for by this subsection" does not mean simply the absence of a judicial seal; according to respondents, a seal is "absent" for purposes of Section 2518(8)(a) if the seal is present but the sealing was delayed. That construction of the statutory language is, at minimum, quite strained. By its natural reading, the phrase "the presence of a seal provided for by this subsection" means simply the presence of the judicial seal referred to earlier in the statute, without regard to when that seal was affixed.

Respondents argue that Congress could not have meant to prohibit the admission of tapes when there is an unexplained absence of a seal, while not prohibiting the admission of tapes when the sealing is delayed. But there is nothing illogical about distinguishing between delayed sealing and the absence of a seal. While the legislative history is unenlightening on this point,[1] Congress may well have considered that cases in which the seal is absent without explanation raise sufficiently grave concerns about authenticity that there should be a special statutory provision

[1] The legislative history does not reveal much about the purpose Congress wanted the exclusionary provision in Section 2518(8)(a) to serve. The provision was first proposed, without comment, by a law professor during hearings on the Omnibus Crime Control and Safe Streets Act. *Anti-Crime Program: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 1041 (1967). It was picked up, again without comment, in S. 2050, Senator Hruska's bill on electronic surveillance. *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1007 (1967). The provision was then included, almost unchanged, in the bill that was reported and enacted. Although the Senate report contains a useful discussion of the purposes of the sealing requirement, it contains only an unenlightening one-sentence paraphrase of the portion of Section 2518(8)(a) at issue here. See S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968).

barring the admission of tapes in those instances. In other cases, such as those involving only a delay in sealing, Congress may have concluded that the risk of tampering was not as great, and that no special statutory rule was called for. In those cases, the issue of authenticity could adequately be addressed by traditional evidentiary rules of authentication. In short, there is nothing about the purpose of the statute that compels the Court to read the word "absence" as if it were the word "delay."[2]

2. Respondents contend (Br. 8 n.4) that we are precluded from relying on the plain language of Section 2518(8)(a) in this Court because we did not rely on the plain language of the statute below. In the court of appeals, we argued (Gov't C.A. Br. 38-48) that Section 2518(8)(a) does not require suppression of tape-recorded evidence as long as the tapes' integrity has been maintained. That is precisely the argument we are making here. In support of that argument, we are contending that suppression is not appropriate merely because of delays in sealing, an argument we also made in the court of appeals. The only legal point that we are making now but did not make in the court of appeals—that the plain language of Section 2518(8)(a) supports our

[2] Respondents argue (Br. 13) that our construction of the statute would permit the government to avoid the exclusion of unsealed tapes simply by having a court seal them the day before the trial. A court, however, is not obligated to seal tapes any time the government presents them for sealing, regardless of the circumstances. A court presented with unsealed tapes the day before trial might well refuse to seal them on the ground that the sealing would achieve nothing and that the circumstances of their remaining unsealed for a long time were too suspicious to ignore. A court's refusal to seal tapes under those circumstances would require the government to provide a satisfactory explanation for the absence of the seal when the government presented the tapes for admission into evidence.

construction of the statute—is one that was not open to us in that court.[3]

We believe that the plain language of the statute provides additional support for the argument we have made throughout this case, and that the "plain meaning" point is not a separate argument subject to waiver if not made below. But even if the plain meaning point should have been formally preserved in the court of appeals notwithstanding the settled law of that circuit, this Court may properly consider it, for two reasons. First, the court of appeals specifically addressed the plain meaning point and reaffirmed its earlier decisions rejecting it. See Pet. App. 6a.[4] Second, the question whether Section 2518(8)(a) authorizes exclusion of tapes because of sealing delays is inextricably intertwined with the question whether suppression should be ordered for sealing delays that are not explained to a court's satisfaction. It is impossible to make a sensible determination whether suppression should be ordered for sealing delays that are not satisfactorily explained, without

[3] The court of appeals had consistently rejected the "plain meaning" argument in prior cases. See *United States* v. *Rodriguez*, 786 F.2d 472, 476 (2d Cir. 1986); *United States* v. *Massino*, 784 F.2d 153, 156 (2d Cir. 1986); *United States* v. *Vazquez*, 605 F.2d 1269, 1274 (2d Cir.), cert. denied, 444 U.S. 981 (1979); *United States* v. *Gigante*, 538 F.2d 502, 506 (2d Cir. 1976).

[4] This Court has held that where issues "are neither raised before *nor considered by* the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (emphasis added). See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Husty* v. *United States*, 282 U.S. 694, 701-702 (1931); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). As that formulation suggests, if the lower court addressed and resolved the issue, it is properly before this Court even if the issue was not raised below by one of the parties. *On Lee* v. *United States*, 343 U.S. 747, 749-750 n.3 (1952); see *Moragne* v. *States Marine Lines*, 398 U.S. 375, 378-379 n.1 (1970); *Thomas* v. *Arn*, 474 U.S. 140, 157-158 (1985) (Stevens, J., dissenting).

asking the preliminary question whether the statute authorizes suppression of tapes for sealing delays in *any* circumstances.[5]

3. Even if respondents are correct in their contention that Section 2518(8)(a) requires a "satisfactory explanation" for sealing delays, there is no support in the text of the statute or its legislative history for their proposed definition of that term. Respondents argue (Br. 29-30) that the admissibility of late-sealed tapes must turn on the "totality of the circumstances," including "the duration of the delay; the diligence of law enforcement in completing the pre-sealing tasks; the frequency (in a case involving multiple wiretap orders) of violations of the immediate sealing requirement; the nature of the circumstances, if any, which diverted those responsible from the presentation of the tapes for immediate sealing; evidence of any prejudice caused to defendants by the delay in sealing; and evidence of any bad faith by the government." Many of those factors, however, bear no relationship to the purpose to be served by the sealing requirement—ensuring "that accurate records will be kept of intercepted communications." S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968).[6] In the absence of any other guidance from Congress, the term "satisfactory explanation" must be defined with reference to that purpose. Accordingly, a "satisfactory explanation" is one that satisfies the court that the delay in sealing did not result in any alteration of the tapes. [7]

[5] This Court has held that an argument not made below must be addressed where "resolution of this issue of law is a 'predicate to an intelligent resolution' of the question on which [the Court] granted certiorari." *Cuyler* v. *Sullivan*, 446 U.S. 335, 342-343 n.6 (1980). See *United States* v. *Mendenhall*, 446 U.S. 544, 551 n.5 (1980).

[6] They may, however, be relevant to determining the appropriateness of contempt sanctions under Section 2518(8)(c).

[7] Respondents err in stating that, under our definition, the deliberateness or bad faith of the supervising attorney is irrelevant. To

Respondents contend (Br. 20-28) that judicial sealing is an extremely important protection against tape tampering, and that the provision in Section 2518(8)(a) that authorizes the exclusion of unsealed tapes should be interpreted as a prophylactic rule designed to avoid the need for inquiry into whether tapes are pristine in particular cases. There are several problems with this argument.

First, while judicial sealing may provide some marginal protection against the risk of tampering, the protection is not complete, nor even very substantial. Since sealing is not required until the end of a period of electronic surveillance and all extensions of that period, weeks or even months may pass between the date particular conversations are intercepted and the date of timely judicial sealing. A government agent or prosecutor bent on tampering with tapes would therefore typically have a lengthy period within which to do so before the obligation to seal matures. Moreover, "sealing" typically consists simply of placing evidence tape over boxes of tapes and returning the tapes to the investigative agency for safekeeping.[8] To any agent or prosecutor bent on committing the crime of obstructing justice by tampering with tape-recorded evidence, the presence of a strip of evidence tape is not likely to be a significant obstacle. Because the protection provided by the sealing mechanism is modest at best, it is unlikely that Congress regarded sealing as so critical to the preservation of tape-

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the contrary, the fact that an attorney deliberately or in bad faith delayed sealing in order to provide an opportunity to alter tapes is obviously highly relevant to the question whether the tapes were in fact altered and would make the government's burden of establishing the tapes' authenticity much harder to meet. There is, of course, no suggestion in the record that the supervising attorney in this case was so motivated.

[8] The legislative history of Section 2518(8)(a) makes clear that the law enforcement agency – not the court – will ordinarily be the custodian of tape-recorded materials, even after the court seals the tapes. See S. Rep. No. 1097, *supra*.

recorded evidence as to warrant the creation of a "prophylactic rule" that would result in the suppression of evidence in cases of delay, even when the tapes could be shown to be unaltered.

Second, because Congress permitted the admission of unsealed tapes upon a "satisfactory explanation" for the omission, the rule Congress created is not a "prophylactic rule" in any event. The rule does not require exclusion of tapes in the absence of immediate sealing if the failure to comply with the statutory sealing requirement can be explained. The presence of such a broad exception to the rule of exclusion undermines respondents' argument that Congress was so concerned with the risk of tampering, and so confident of the capacity of the judicial seal to prevent tampering, that it wished to enforce compliance with the sealing requirement by requiring the suppression of tape-recorded evidence whenever there was a delay in sealing. Instead, the "satisfactory explanation" proviso supports the view that Congress regarded the presence of a seal (or an explanation for its absence) as simply a prerequisite for admission of tape-recorded evidence, one that would exclude tape-recorded evidence only in the most extreme cases, where the risk of actual tampering was deemed to be intolerably high.[9]

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[9] Respondents argue (Br. 19-20) that our construction of Section 2518(8)(a) is flawed because it would simply convert the rule requiring the presence of a seal (or a satisfactory explanation for its absence) into a bar to unauthenticated evidence that would already be subject to exclusion under Fed. R. Evid. 901. Respondents have overlooked the fact that the evidentiary bar in Section 2518(8)(a) is much broader than the bar erected by Rule 901. Under Section 2518(8)(a), if tapes are unsealed and there is no satisfactory explanation for their condition, the consequence is not merely to exclude the tapes themselves, but also to exclude any "evidence derived therefrom." That is a much broader principle of exclusion than the one found in Rule 901, which excludes only the unauthenticated evidence itself.

As part of their "prophylactic rule" argument, respondents contend that the admissibility of electronic surveillance evidence should not depend on the integrity of the tapes, because it is difficult to determine whether tapes have been altered. But in most cases in which sealing delays occur, the government will satisfy its burden of showing that the tapes are authentic by establishing an unbroken chain of custody. Ordinarily, expert testimony will not be necessary to establish tape authenticity.[10]

In those cases in which expert testimony is admitted, it can be quite helpful in determining authenticity. In this case, for example, the government offered an expert in tape authenticity to rebut respondents' allegations of tape tampering. Pet. App. 51a-52a. The government's expert performed several tests on a sample of ten sealed original tapes selected by respondents from the 166 tapes designated by the government as relevant. Presumably, respondents selected those ten tapes because they regarded them as the most suspect of the entire lot. See Pet. App. 55a. Yet, the government expert concluded that nine of the ten tapes are original recordings. Pet. App. 52a. With respect to the tenth tape, the expert testified that it contained insufficient data from which he could render an opinion. *Ibid.* The district court credited the expert's testimony and found that "the subject tapes are originals." Pet. App. 53a-55a. Accordingly, there is nothing in this record that supports respondents' claim that tape authenticity is impossible to determine.

4. Respondents allege (Br. 34) that the delays in sealing the Levittown tapes and the Vega Baja public telephone tapes recorded pursuant to the January 18, 1985, order were

[10] Unable to impeach the government's chain-of-custody evidence in this case (see Pet. App. 30a-45a), respondents presented expert testimony on the subject of tape authenticity. Only then, in rebuttal, did the government present the testimony of its expert.

the result of Justice Department attorney Frank Bove's "deliberate decision to ignore the law." The record, however, does not support that assertion. The district court found that "nothing in the record indicates that Bove intentionally ignored the applicable law or deliberately failed to seal the tapes. Rather, [Bove] believed his interpretation was within the law and no evidence is on the record that even suggests that he purposefully flouted the requirement or failed to carry out his duties." Pet. App. 78a. The court of appeals, while critical of what it considered a serious legal error on Bove's part, did not reject the district court's finding on this point or in any other way suggest that Bove's error was deliberate. See Pet. App. 12a.[11]

Respondents charge (Br. 35) that we have mischaracterized Bove's explanation of why he did not have the Levittown tapes sealed as soon as surveillance at that location ceased. To the contrary, our characterization of Bove's position was entirely fair. Nonetheless, because respondents seek to make much of Bove's explanation for his sealing decisions, we shall address the matter in some detail.

Bove stated that he believed he was required to seal the tapes "when there occurred a meaningful hiatus in our authority to intercept communications," J.A. 4-5. He explained that he reached that conclusion because "the targets of this investigation changed residences and vehicles so frequently, we considered the interceptions at various locations to be interrelated and part of the same investigation." J.A. 4; see Pet. App. 77a; Oct. 27, 1987, Tr. 129-130.

[11] Bove testified that although he was a novice in electronic surveillance when he was assigned to this investigation, he prepared himself for his task by reading the statute, a number of court decisions, and several secondary sources. J.A. 23-24; Oct. 27, 1987, Tr. 112-113, 167. Bove derived his conclusion as to when sealing was required from the text of the statute itself. Oct. 27, 1987, Tr. 177; Oct. 28, 1987, Tr. 49.

From the outset in April 1984, the principal target of the Levittown interception orders was respondent Filiberto Ojeda Rios (Ojeda). Oct. 27, 1987, Tr. 122, 124, 129. During that period, the government also obtained a series of interception orders for Ojeda's automobile, a Datsun Sentra. Pet. App. 20a. When Ojeda moved from Levittown to El Cortijo in July 1984, the government sought a new interception order for his new residence in El Cortijo. Oct. 27, 1987, Tr. 122-124. The El Cortijo interception order was extended until September 25, 1984, and the Datsun Sentra interception orders were extended until October 10, 1984. The El Cortijo, Datsun Sentra, and Levittown tapes were all sealed on October 13, 1984. Pet. App. 96a.

Bove explained that he regarded the El Cortijo interception orders as extensions of the Levittown interception orders, because El Cortijo was simply Ojeda's new residence. J.A. 26 ("To us[,] the only reason we went in and sought authority to intercept conversations at El Cortijo * * * was because that was the latest address where we felt that Ojeda was living. The only reason we switched from Levittown was because his residence, in effect, switched."); Oct. 28, 1987, Tr. 16 ("I viewed it as an interrelated investigation * * * the El Cortijo application [was] really just a continuation and an extension of our authority to intercept Mr. Ojeda's residence. It was a continuation in that respect."); *id.* at 62 ("we viewed the move by Mr. Ojeda from one location to another as simply a continual attempt to monitor his residence."); see also J.A. 40-41; Oct. 28, 1987, Tr. 63, 79, 80, 83-84.

Bove further concluded that the sealing requirement did not mature until the last interception order for the Datsun Sentra expired on October 10, 1984, because that was the last outstanding interception order directed at Ojeda. Oct. 27, 1987, Tr. 129. Thus, it was not until the authorities "lost track of Mr. Ojeda" in early October 1984 that Bove

concluded he was required to seek judicial sealing for the Levittown tapes. Oct. 27, 1987, Tr. 124; Oct. 28, 1987, Tr. 15. Until then, Bove considered the various surveillance orders directed at Ojeda to be "part of one continuous, full, extension of an ongoing investigation." Oct. 27, 1987, Tr. 194.

The district court made the same point during the course of the suppression hearing. During Bove's testimony, the court summarized Bove's position as follows (J.A. 26):

> THE COURT: As I understand it, your application of the statute, as you saw it, was that it was applicable to the target subject, so to speak, as long as there was a continuous order against him rather than the location being the target where the authorization originally stemmed from?
>
> THE WITNESS: That's the way I viewed it, your Honor.

Respondents contend that the Levittown tapes should be excluded because Bove acted unreasonably in drawing the legal conclusion that the El Cortijo surveillance orders could be regarded as extensions of the Levittown surveillance orders and that the obligation to seal the Levittown tapes therefore did not mature upon the expiration of the last order authorizing surveillance at that location. As we discussed in our opening brief, however, the Second Circuit's own prior decision in *United States* v. *Principie*, 531 F.2d 1132, 1142 & n.14 (1976), cert. denied, 430 U.S. 905 (1977), was consistent with that conclusion, since the *Principie* court held that the term "extension" can embrace an order authorizing surveillance in a new location to which a target has moved. Thus, in that respect at least, Bove's construction of the statute was in accordance with the Second Circuit's own rule at the time. His conclusion that he did not have to seal the Levittown tapes when Ojeda and the

surveillance moved to El Cortijo was therefore reasonable, even if it was not correct.[12]

Likewise, with respect to the Vega Baja public telephone tapes, Bove did not believe that the hiatus between the expiration of the first order on February 17, 1985, and the issuance of the extension of that order on March 1, 1985, triggered the sealing requirement for the first group of tapes. Oct. 27, 1987, Tr. 180. Respondents do not even attempt to attribute any bad faith to the government for this 12-day hiatus. Instead, they argue that Bove's explanation was "deficient" because the Department of Justice's Office of Enforcement Operations was unable to complete its revision of the underlying affidavit within the 12-day period.[13] Significantly, they do not address the Second Circuit's decision in *United States* v. *Scafidi*, 564 F.2d 633, 637, 641 (1977), cert. denied, 436 U.S. 903 (1978), which countenanced a 23-day hiatus between the original application and an extension.

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[12] Respondents are incorrect in stating (Br. 35 n.20), that we have conceded that the El Cortijo surveillance order was not an "extension" of the Levittown order. We made no such concession; instead, we simply did not seek review on that issue, and we have accordingly accepted "for the sake of argument" the district court's calculations of the sealing delays. Gov't Br. 26 n.18.

[13] Respondents make much of the fact that Bove stated that the 12-day delay was necessary to rewrite the electronic surveillance affidavit, but that the affidavit submitted on March 1, 1985, was not substantially different from the one submitted on January 18, 1985. In fact, Bove's explanation was accurate. As we explained in our opening brief, the filing of an extension application was delayed while attorneys in Washington worked on a revised affidavit, but when it became clear that the revision was taking too much time, the decision was made to use the prior affidavit as the basis for the March 1, 1985, extension application. The substantially revised affidavit was presented a month later, in support of the March 31, 1985, extension application.

There is nothing in the statute that requires that extensions be sought without any period of interruption in surveillance. Certainly, the requirement that evidence be excluded in the absence of a seal or a satisfactory explanation for its absence cannot be stretched to require exclusion where the only "flaw" in the proceedings is that the extension order did not follow immediately upon the termination of the original surveillance order. Moreover, in light of the *Scafidi* decision, which held that an extension order was still an extension order even after a hiatus longer than the one in this case, it is very difficult to understand how the court of appeals could regard Bove's legal conclusion on this issue as unreasonable.

5. At the end of their brief, respondents assert that the government was guilty of "widespread overreaching during its electronic surveillance investigation, including use of a secret recording system and intentional violations of Title III and court orders." Br. 40. Those allegations were rejected by the district court and were not addressed by the court of appeals. Respondents appear to recognize that those allegations are not before this Court for decision, but they nonetheless refer to them, apparently in an effort to persuade the Court that the investigation in this case "demonstrate[d] a contempt for the rule of law." Resp. Br. 40.

Respondents' allegations are wholly without merit. First, respondents contend (Br. 41-46) that the monitoring agents acted unlawfully because they not only recorded the intercepted conversations on reel-to-reel tapes, which were preserved for use as evidence, but also simultaneously recorded the conversations on cassette tapes. As the district court found, the agents used the cassette tapes to help them prepare contemporaneous written summaries of the intercepted conversations. When a summary was completed, the tapes were ordinarily reused. 695 F. Supp. 1369,

1371-1373. The district court held that this practice was entirely lawful, that the agents did not knowingly record conversations on the cassette tapes that were not simultaneously recorded on the original tapes, that the government did not have a duty to preserve those tapes, and that respondents were not prejudiced by the erasure and reuse of the tapes.[14] 695 F. Supp. at 1373-1378. Respondents cite no authority for their claim that the practice of making a second recording of recorded conversations was unlawful.

Respondents next claim (Br. 46-47) that the government solicited false affidavits from the monitoring agents to submit in response to respondents' suppression motions. Again, the record refutes that claim. The case agent advised the monitoring agents of respondents' allegations of illegality in the course of the investigation and asked the agents to sign a prepared affidavit responding to those allegations if they agreed that the affidavit was correct. The monitoring agents were specifically directed *not* to sign the affidavit if they believed it to be in any way inaccurate.[15]

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[14] Thirty-nine of the cassettes were preserved. Four of those 39 tapes contained a few minutes of conversations that were not recorded on the original reel-to-reel tapes. 695 F. Supp. at 1378. The district court found, however, that the amount of information that was recorded on the cassette tapes but not on the original reel-to-reel tapes was de minimis, *id.* at 1377, 1378, that the monitoring agents believed in good faith that everything recorded on the cassette tapes was also recorded on the reel-to-reel tapes, *id.* at 1373, 1376, 1377-1378, and that the loss of evidence resulting from the erasure of some of the work cassettes was inadvertent and not prejudicial to the defendants, *id.* at 1377-1378.

[15] The monitoring agents were directed to "sign the [draft] affidavit before a notary only if [you] completely agree with everything in the affidavit." Any agent who "for any reason * * * can not agree with any portion of the affidavit" was directed to contact a specified member of the prosecution team. Telegram to Director, FBI, from SAC, New Haven, dated Oct. 20, 1986. Defendants' Pretrial Exh. 2385.

Finally, respondents assert (Br. 47-48) that the monitoring agents listened to conversations without recording them. After hearing the testimony of 25 monitoring agents, the court found no basis in the record for respondents' allegation that the agents regularly engaged in such a practice. 695 F. Supp. 1379, 1380, 1384, 1393. Indeed, the court found that only two of the 64 monitoring agents ever deliberately engaged in live monitoring without recording. *Id.* at 1393, 1394. Because the Vega Baja public telephone orders authorized the agents to record only the conversations of targets of the investigation who used the phone booths, those two agents occasionally listened briefly to a call to determine, where visual observation was inadequate, whether the caller was one of the targets. Once the agent determined by voice identification that a non-target had placed the call, he would discontinue the monitoring. Significantly, the court found that all the conversations to which respondents were parties were recorded, and that respondents were therefore not prejudiced by the occasional failure to record the conversation of a non-target. 695 F. Supp. at 1394-1395.[16] Section 2518(8)(a) of Title 18 requires that intercepted conversations shall be recorded "if possible." That provision was intended to assure that the "best evidence" of the intercepted conversations would be available at trial; it was not intended to protect the targets' Fourth Amendment privacy interests. Accordingly, the few instances of listening without recording, which the district court referred to as "de minimis" (695 F. Supp. at 1396), do not affect the admissibility of any of the conversations,

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[16] The court found that there were only two instances other than those involving the two agents surveilling the Vega Baja public telephones in which listening without recording had occurred: once as the result of a power failure in the recording equipment, and once when an agent overheard a small portion of a conversation on the receiving unit in his surveillance vehicle but did not have a recording device in his possession. 695 F. Supp. at 1386.

and certainly not the lawfully intercepted, taped conversations to which respondents were parties. See *United States* v. *Clerkley*, 556 F.2d 709, 718-719 (4th Cir. 1977), cert. denied, 436 U.S. 930 (1978); *United States* v. *Daly*, 535 F.2d 434, 442 (8th Cir. 1976); see generally *United States* v. *Donovan*, 429 U.S. 413, 434 (1977).[17]

In short, respondents exhaustively examined 25 agents during the suppression hearing but were unable to show any pattern of unlawful conduct during the investigation. As the district court found, the most they were able to show was an occasional inadvertent error in the monitoring process that did not in any way prejudice respondents.

6. Amici Asian-American Legal Defense Fund, et al. argue that electronic surveillance is illegal in Puerto Rico because it is prohibited by the Puerto Rico Bill of Rights. See P.R. Const. Art. II, § 10 ("Wire-tapping is prohibited. * * * Evidence obtained in violation of this section shall be inadmissible in the courts."). Respondents sought suppression on this ground in the district court, and the district court rejected their claim. 649 F. Supp. 1183. They raised the same issue in a civil suit, and the claim was rejected there by the First Circuit. *Camacho* v. *Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 487-488 (1989). Respondents have not raised the issue in this Court, however, and it is therefore not presented for decision.

In any case, there is no merit to this claim. Amici do not dispute that Congress intended the federal wiretapping statute to displace conflicting state and local laws pertaining to wiretapping (*Camacho*, 868 F.2d at 487) so that evidence obtained by federal officers in compliance with the federal statute would be admissible in federal court, whether

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[17] Nor did the government attempt to conceal from respondents the existence of any work cassettes or the occasional instances of listening without recording. See 695 F. Supp. at 1373-1375.

or not that evidence would have been admissible in state court proceedings. 18 U.S.C. 2517(3); *United States* v. *Quinones*, 758 F.2d 40, 43 (1st Cir. 1985); *United States* v. *Adams*, 694 F.2d 200, 201 (9th Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *United States* v. *Horton*, 601 F.2d 319, 323 (7th Cir.), cert. denied, 444 U.S. 937 (1979); *United States* v. *Hall*, 543 F.2d 1229 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1075 (1977); *United States* v. *Armocida*, 515 F.2d 49, 52 (3d Cir.), cert. denied, 423 U.S. 858 (1975). Section 2510(3) of Title 18 defines "State" to include Puerto Rico. Consequently, the intercepted conversations are not subject to suppression on the ground that electronic surveillance is not authorized by the laws of Puerto Rico.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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NO. 89-61

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

VERSUS

FILIBERTO OJEDA RIOS, ET AL, RESPONDENTS

On Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS OJEDA RIOS, ET AL

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STATEMENT OF INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a national organization of criminal defense lawyers of approximately 6,000 members. Numbered among its members, and included on its board of directors, are federal public defenders and their deputies, and private lawyers who fill the Criminal Justice Act panels for appointment. All of the

defense lawyers in this case are appointed to represent respondents at government expense.

The NACDL, according to its by-laws, seeks among other things to foster, maintain and encourage the integrity of the criminal laws and their operation; to protect individual rights; to preserve and strengthen the adversary system of justice; and to ensure justice and due process for persons accused of crime. It is consistent with these goals that the executive arm of the federal government be held to the strictures of statutes enacted to protect defendants in criminal cases. The government's obligation to be bound by the rule of law is implicated in this case, thus making this case an appropriate one for amicus support of respondents' position by the NACDL.

SUMMARY OF ARGUMENT

Section 2518(8)(a) of Title 18, United States Code, creates a prophylactic rule to meet the danger that court authorized electronic surveillance tapes may be edited or altered. That prophylactic rule is the immediate sealing requirement. It prevents adulteration of the tapes in the most vulnerable period, after surveillance is completed, when the tapes can be reviewed for evidentiary gaps and like disappointments, and edited or altered to remove the gaps or strengthen the evidence. The tapes are protected from the point of sealing forward, and from the prophylactic perspective of the rule, the earlier the better.

As with all prophylactic rules, the application of the rule here may result in the exclusion of evidence that does not in fact suffer from the evil that the prophylactic rule was designed to prevent.

However, the very reason for a prophylactic rule is that the evil, when it in fact occurs, may be incapable of proof. The prophylactic rule shifts the focus of proof from the occurrence vel non of the evil to whether or not the rule was honored.

Obedience to the prophylactic rule of subsection (8)(a) is the evidentiary foundation for admissibility of testimony introducing the tapes. That is why Congress called the seal, or satisfactory proof of its delay or absence, "a prerequisite for the use or disclosure" of the tapes. As with any other evidentiary foundation, if the foundation of a seasonable sealing is not made out, the tape evidence is not admissible.

Because the essence of the prophylaxis is in the immediate sealing, a delayed sealing without justification is a violation of the prophylactic rule.

Because a prophylactic rule is useful and utilized only when the evil it is designed to prevent may be incapable of independent proof, the inability to prove the existence in fact of the evil in the particular case is not a satisfactory explanation for the absence of or delay in sealing. Because a prophylactic rule becomes useless if violated, and there will always be some explanation of why any rule is violated, the "satisfactory explanation" for delayed obedience to the statute must be something more than a mere chronicle of the events leading up to the violation; a satisfactory explanation is one that is affirmatively justified under the totality of the circumstances.

ARGUMENT

1. The surveillance and interception by electronic devices of private conversations between citizens, by the police force of our national government,

drastically alters the balance of privacy and power that had obtained between American citizens and their government during the first two centuries of the Republic. By 1968, if not before,[1] state of the art electronic technology enabled the ready and indiscriminate exercise of this surveillance power by the investigative agencies of the national government. On the one side there were legitimate and pressing law enforcement needs. On the other side there was the spectre of Big Brother and the distortions and manipulations to which the electronic surveillance power could lend itself. In 1968 it was time to regularize the procedures, to enable the process of legitimate law enforcement while limiting the powers of government for abuse.

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[1]See Lopez v. United States, 373 U.S. 427, 441 (concurrence of Chief Justice Warren), 446 (dissent of Justice Brennan).

Section 2518 of the 1968 law (18 U.S.C. §§2510-2520, as amended) creates procedures that both enable legitmate law enforcement and limit the potential for abuse by law enforcement of the electronic interception power. Subsection (8)(a) addresses one of the preeminent concerns for abuse, the fear and misgiving that sophisticated electronics applied to tape recordings could alter and edit the meaning and import of this powerful evidence. The government concedes as much. "The principal purpose of Section 2518(8)(a) is to ensure the integrity of evidence obtained through electronic surveillance." Brief for the United States, p. 21.

2. Tape recordings can be altered or edited as they are made. They can be altered or edited after they are made. The ability to protect against alteration and editing, as well as the intrusions

necessary for such protection, differ depending upon where one is in the process.

Congress began in subsection (8)(a) by entreating the intercepting agency during the first stage, the recording process, to "protect the recording from editing or other alterations." What more could Congress do during this stage of the process? Because of constraints deriving from the essential secrecy and technical execution of electronic surveillance, who safely could be called upon to monitor and watch the electronic spies at work without compromising the effectiveness of their work? A judge would be the only safe choice. But could a judge feasibly be transplanted from the courtroom to the electronic war room to assure the integrity of the recording operation? And even if he could, how would judicial expertise over sophisticated electronic

methodologies be assured? There simply was no feasible way for Congress to monitor the monitors at the recording stage.[2] Therefore, Congress was reduced to the use of precatory words:

> The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations.

Once the recording process is complete, the tape recordings themselves have become evidentiary objects. They are items of evidence that have been created under judicial sanction. The objects themselves can now be moved, in fact removed, from those who might or have cause to edit or alter them. Moreover, it is with these evidentiary objects in hand at the end of the surveillance period that the greatest

[2]Compare the differing constraints, in secrecy and in expertise, that enable an attorney to be an effective monitor during a corporeal lineup. See, United States v. Wade, 388 U.S. 218 (1967).

danger of editing and alteration exists. Conversations, once recorded, can be played over and over again and compared for evidentiary gaps and like disappointments. With the leisure to deliberate and reflect, with the time to edit and alter, the possibility and feasibility of adulteration of the tapes increases.[3]

[3]Note that in reacting to the decision in Jencks v. United States, 353 U.S. 657 (1957), the Justice Department registered its grave concern that if prosecutors were required to produce and disclose prior statements of its witnesses to the defense well before trial, the defense would be enabled to fabricate evidence to counter the government's witnesses. A principal danger was perceived to be in the lead time the defense would have to reflect upon, evaluate and react to the statements. Thus the Department prevailed upon Congress to limit the forced disclosure of witness statements until after the witness had testified. 18 U.S.C. §3500. And see Rule 26.2, F.R.Cr.P.

Given its experience with the Jencks Act, Congress could well have entertained concerns about lead time for the adulteration of taped conversations, as it did for lead time with regard to prior statements of government witnesses in the Jencks situation. After all, the 1968 act began its legislative journey through

Adulteration that serves the adulterer's purposes, yet has the greatest chance for avoiding detection, takes time. Immediate transfer of the originals of the tapes to the custody of a judicial officer is thus an appealing and practical solution, because it minimizes the time available to a potential adulterer. Immediate sealing insures that the tapes will be preserved intact and safeguarded against editing and alterations from the point of sealing forward. Congress had available a feasible and practical method to guarantee the integrity of tapes at this stage in the process. Congress was not limited to precatory admonitions.

Congress not long after Justice Brennan, in dissent in Lopez v. United States, 373 U.S. 427, 468 (1963), warned that: "Far from providing unimpeachable evidence, the devices lend themselves to diabolical fakery." In n. 17, Justice Brennan described an experiment by Professor Dash in which a sound studio "edited a tape in such a way as to reverse its meaning," yet the tape could not satisfactorily be proven to have been adulterated.

Enforcible restraints were available to it.

3. By enacting the requirement of immediate sealing, Congress created a prophylactic rule. As with all prophylactic rules, the prophylactic rule Congress created in subsection (8)(a) might operate more broadly than a particular case might, after the fact, turn out to need, but who would doubt the authority of Congress to create such a preventive rule?

Consider prophylactic rules created by this Court. The rule of Miranda v. Arizona[4] is designed to prevent coerced confessions, but it sometimes keeps fully voluntary confessions either from being made or, if made, from being introduced. What this prophylactic rule does most importantly for our system, however, is keep a percentage of truly involuntary

[4]384 U.S. 436 (1966).

confessions, confessions which in a courtroom could not adequately be proved involuntary, from infecting the process. The rule of United States v. Wade[5] is designed to insure the fairness of corporeal lineups, but because it is a prophylactic rule, it will, if violated, keep some fully fair identifications from consideration by the jury. What this prophylactic rule does most importantly for our system, however, is help to keep the police straight, and prevent a percentage of truly suggestive lineups, lineups which in a courtroom could not adequately be proved to be suggestive, from infecting the process.[6]

[5]388 U.S. 218 (1967).

[6]Compare, Tanner v. United States, ___ U.S. ___, 107 S.Ct. 2739 (1987), in which prophylactic Rule 606(b), F.R.Ev., regarding juror impeachment of the verdict, was construed by the Court to bar truthful testimony to prove a shocking and rampant abuse of mind altering substances by members of a jury sitting to judge culpability in a difficult, complex and serious federal criminal trial. If ever

The controversy surrounding these court created prophylactic rules in large part centers not on their utility but on whether the Court, rather than Congress, should "legislate" prophylactic rules and make the policy choices embodied in them. There can be no question but that Congress has the authority to create prophylactic rules such as the rule here of immediate sealing. The policy choices embodied in a prophylactic rule legislated by Congress are not subject to second-guessing or mitigation by the courts.

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one might expect consensus by the citizenry on the fairness of a criminal trial, this was the case. The idea that a pixillated jury could be approved as constitutional, and that a citizen could be barred from proving the travesty in the courtroom, would surely evoke universal dismay. Yet the Court, recognizing that "[t]here is little doubt that post-verdict investigation into juror misconduct would [and presumably, if allowed, should] in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," ___ U.S. at ___, 107 S.Ct. at 2747, upheld the prophylactic rule, even though the truth thereby became impossible of proof.

The prophylactic rule of immediate sealing recognizes the technological difficulty and expense involved in proving that tapes have been edited or otherwise altered. The procedure recognizes that a battle of experts, costly enough when all parties are of equal resource and problematic at best when an imbalance between government and ordinary litigants is counted in, may not be able to resolve questions of subtle editing and alteration. The procedure recognizes that there will be a residuum of cases in which no expert examination after the fact will prove one way or the other whether tapes have been tampered with, and so seeks to guard in advance against the possibility of tampering.

The procedure removes the question from litigation by imposing the prophylatic prerequisite of immediate sealing, and it confines litigation to the presence of a

timely seal or satisfactory explanation for the absence of the timely seal. In other words, the procedure demanded by Congress obviates the need for a hearing at which, as a practical matter, it might be impossible to to make the showing that convinces a judge that tape recordings, in fact altered or distorted, were compromised.

The seal proves the integrity of the tapes from the point of sealing forward. All delays in sealing undermine the prophylactic protection for the tapes, because delay creates the opportunity for adulteration. The "seal provided for by this subsection" is the immediate seal that guarantees without a hearing the integrity of the tapes from the point of sealing forward.

Subsection (8)(a) provides a safety valve for a too-rigid application of the rule of immediate sealing. "[A]

satisfactory explanation for the absence" of an immediate seal avoids mindless application of the rule to short delays compelled by unforeseen circumstances. Congress' intention was not, however, to create a hearing on the integrity of the tapes when the government seeks to justify a delayed sealing. Rather, the hearing is to be limited to the satisfactoriness of the government's explanation, a relatively limited and manageable hearing in contrast to the unwieldy investigation and hearing necessitated by questions of editing and tampering.

4. Although denominated by the various parties as an issue of suppression, the question before this Court properly is one of the foundation for admissibility of a certain class of sensitive evidence, to-wit, tapes of court authorized electronically intercepted communications. Congress is surely at liberty to devise

foundation requirements for a kind of evidence it considers to be highly vulnerable to manipulation and distortion and to demand that its evidentiary rules be honored. As with any other required evidentiary foundation, if the foundation is not there, the evidence upon which it rests is inadmissible.

The seal, or a satisfactory explanation for the absence of or the delay in sealing, is a foundation for the admissibility of the tapes in evidence. It is the sine qua non of admissibility. In the terminology of the statute, it is "a prerequisite for the use" of the tapes.

Section 2517 is the authorization section of the statute for disclosure and use of electronically intercepted communications. The statutory section at issue in this litigation, subsection (8)(a) of Section 2518, makes the sealing foundation "a prerequisite for the use or

disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517." Subsection (3) of Section 2517 declares the authority and competency "while giving testimony" of a person who has received information concerning electronically intercepted communications to disclose the contents of such communications. Thus, the sealing requirement is the foundation for testimony through which tapes are sought to be admitted, as it is the "prerequisite" for disclosure "while giving testimony." Other uses authorized by Section 2517 (such as the sharing of investigative leads with other investigators) are not governed by the sealing requirement; only the right to give testimony under oath in any proceeding held under the authority of the

United States is controlled by the presence or absence of a timely seal.

5. With this analysis the government's arguments are readily met and overcome. The government first argues that the statute does not require suppression of the tapes because of a delay in sealing; a seal any time before introduction of the tapes is all that is demanded. Because, however, immediate sealing is the essence of the prophylaxis deemed necessary by Congress, and because a seal placed on tapes long after the opportunity for adulteration has passed is no more effective than locking the barn door after the horse has escaped, the government's argument must fail. The "seal provided for by this subsection" is an "immediate" seal.

The government next argues that as the objective of Congress' prophylactic rule is integrity of the tapes, the tapes

should be admissible if the defendants cannot satisfy the court that the tapes have been compromised. However, an essential motivating force behind the prophylactic rule is that it may be impossible to prove that tapes, which are in fact compromised, have been edited or altered. The function of the prophylactic rule is to dispense with the task, perhaps impossible of accomplishment, of proving adulteration, by the act of sealing to prevent adulteration. When Congress unambiguously stated that seasonal sealing is the "prerequisite" for admissibility, it meant what this Court meant when it designed prophylactic rules in the confession and lineup situations, and when it enforced the prophylactic rule in the juror impeachment situation. The rule is violated even if the evil which the rule is designed to prevent is not provable in the particular case.

Finally the government argues that the "satisfactory explanation" required by subsection (8)(a) for the absence of the immediate seal is no more than a chronicle of the why's and wherefore's, rather than a justification that is to be supported by the persuasiveness of the reasons for the delay in sealing. It has been said with some justice that every crime can be explained. It has also been said that explanation is not justification. Amicus takes no position on the particular contours of the formulation of the test for finding when a satisfactory explanation exists, but sees no reason why the totality of the circumstances

formulation of the court of appeals, found by this Court to be appropriate in so many other applications in the criminal law, is not suited as well to the task at hand.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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For The National Association of Criminal Defense Lawyers

January 1990

No. 89-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FILIBERTO OJEDA RIOS, ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* THE ASIAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE INSTITUTO PUERTORRIQUENO DE DERECHOS CIVILES, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD

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QUESTIONS PRESENTED

Whether the "locally inapplicable" Clause of the Federal Relations Act and the ban on wiretapping in Puerto Rico's Constitution render the wiretapping provisions of the Omnibus Crime Control and Safe Streets Act inapplicable in Puerto Rico, thus requiring suppression of all conversations wiretapped in Puerto Rico pursuant to the Crime Control Act.

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CONSENT OF THE PARTIES

The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of the Court.

INTEREST OF AMICI

Amici are aware of the great significance of the instant appeal. Amici also recognize the threat to privacy rights that would result from the virtually unrestricted use of electronic surveillance which would result if the government's interpretation of the immediate sealing requirement in the wiretapping provisions of the Omnibus Crime Control and Safe Street Act should prevail. With this in mind, amici wish to provide the Court with a valuable and unique perspective on the interests

asserted in this case.

Amici will not, however, undertake a discussion of or address themselves to the proper interpretation of the sealing requirements in the Crime Control Act; arguments which are set forth fully and most adequately by respondents in their briefs. The issues we will address direct themselves to a presentation of the historical development of the relationship between the U.S. and Puerto Rico, promises and representations that were made as that relationship developed to its current state and how those promises and representations must inform resolution of the questions before the court. Amici believe the issues presented by this case are of great public interest, and that they can assist this Court in giving those issues full and careful consideration.

The Asian-American Legal Defense and Education Fund (AALDEF) is a national civil rights organization committed to the defense of civil liberties and privacy rights. AALDEF's current program priority areas address the rise of anti-Asian violence, immigrant rights, employment and labor rights, voting rights, and redress for Japanese Americans who were interned during World War II and had their civil and constitutional rights violated by the U.S. Government. AALDEF joins amici in opposing the application of the wiretap provisions of the Omnibus Crime Control and Safe Streets Act to Puerto Rico. Such application constitutes a violation of the laws and conditions governing the relationship between the United States and Puerto Rico.

The Center for Constitutional Rights (CCR) is a non-profit law collective born in 1966 out of the southern civil rights struggle. CCR was founded by attorneys dedicated to the creative use of law as a vehicle for social change. CCR has litigated cases supporting Puerto Rican self-determination and views this case as a particular threat to Puerto Rico's autonomy. CCR together with the Instituto Puertorriqueno de Derechos Civiles litigated Camacho v. Autoridad de Telefonos, 868 F.2d 482 (1st Cir. 1989). CCR views the applications of the Omnibus Crime Control and Safe Streets Act as a direct threat to Puerto Rican autonomy.

The Instituto Puertorriqueno de Derechos Civiles (Instituto) is a non-profit legal organization established in 1982. Its purpose is to use its legal expertise to defend and expand human and

civil rights in Puerto Rico. It has become prominent and enjoys great prestige in Puerto Rico and the United States for legal work which fosters social change and promotes self-determination in Puerto Rico. Together with the Center for Constitutional Rights the Instituto litigated Camacho v. Autoridad de Telefonos, 868 F.2d 482 (1st Cir. 1989) and is well versed on the issues presented in this brief. The Instituto joins amici in opposing application of the wiretapping provisions of the Omnibus Crime Control and Safe Streets Act to Puerto Rico.

The National Conference of Black Lawyers (NCBL) is an organization of judges, lawyers, and law students whose principle concern is with the uses of the law to bring about racial justice and equality. The NCBL views colonialism and

the imposition of inferior status on a nation, as one particularly pernicious form of inequality, which is in violation of the United States Constitution, as well as international law.

The National Lawyers Guild (NLG) is an organization of lawyers, law students and legal workers. Since its inception in 1937, it has been dedicated to providing vigorous representation to individuals whose political views and expressions have resulted in unjust criminal prosecution. The NLG has long been active in providing representation to a wide array of individuals and organizations seeking a free and independent Puerto Rico.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth by the appellees herein.

SUMMARY OF ARGUMENT

The Puerto Rico Bill of Rights specifically and absolutely forbids wiretapping whether by government authorization or by private persons. P.R. Constit. art II, §10. Under the Puerto Rico Federal Relations Act, 48 U.S.C. §§731-916 (1981), specifically §734, U.S. statutes which are "locally inapplicable" may not be given effect in Puerto Rico. In view of Puerto Rico's Constitution, the Omnibus Crime Control and Safe Streets Act 18 U.S.C. §§ 2510-2521 (1979) is clearly inapplicable to the extent that it authorizes electronic eavesdropping. Despite the Crime Control Act's representations of applicability to Puerto Rico, the Congress of the United States can not unilaterally make it so by simple Congressional supremacy, as the relationship between Puerto Rico and the

U.S. is governed by a mutual compact. Therefore, the tapes at issue in the case at bar must be suppressed as the fruits of illegal wiretaps.

ARGUMENT

I. The Tapes At Issue Herein, Secured Pursuant To The Omnibus Crime Control And Safe Streets Act, Must Be Suppressed As The Federal Relations Act Together With Article II Section 10 of Puerto Rico's Constitution Make The Wiretapping Provisions Of The Crime Control Act Inapplicable In Puerto Rico.

The provisions of the Puerto Rico Federal Relations Act, 48 U.S.C. §§731-916 (1981), (hereinafter Federal Relations Act), and the ban on wiretapping in Puerto Rico's Constitution together render the provisions authorizing wiretapping in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-2521 (1979) (hereinafter Crime Control Act)

inapplicable in Puerto Rico. Section 734 of the Federal Relations Act, specifically provides, in part, that "(t)he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States." The currently existing anti-wiretapping provision in Puerto Rico's Constitution, Art. II, §10, enacted subsequent to enactment of the Federal Relations Act and well in advance of the Crime Control Act, is an absolute ban which triggers the "locally inapplicable" provision and renders the wiretapping provisions of the Crime Control Act inapplicable in Puerto Rico.

The local inapplicability to Puerto Rico of the Crime Control Act wiretapping provisions can be seen by examining the

nature of the relationship between the United States and Puerto Rico as it was shaped by the historical and legal developments which led to the adoption of the Puerto Rico Constitution and the creation of the Commonwealth of Puerto Rico. The Federal Relations Act which established the legal framework for the current Puerto Rico-United States relationship, also mandates the conclusion of local inapplicability of the wiretap provisions of the Crime Control Act.

A. The Commonwealth Constitution's Wiretapping Prohibition Is an Integral And Indispensable Part of the Constitutional And Statutory Right To Privacy in Puerto Rico And A Cornerstone of Puerto Rican Cultural Values.

Article II, Section 10 of the Puerto Rico Constitution establishes clearly that: "wiretapping is prohibited". As stated by the Puerto Rico Supreme Court,

this clause is an integral part of the general right to privacy in Puerto Rico. The right to be free from wiretapping responds to the specific intent to bar, without any doubt, unconsented intrusion into telephone communications. P.R. Tel. Co. v. Martinez, 114 P.R.Dec. 328 (1983). Insofar as this provision is part of the Commonwealth Constitution Bill of Rights, it reflects an aspiration that is part of the definition of Puerto Ricans as a people. It is a fundamental right in Puerto Rico. See Puerto Rico Civil Rights Commission Report 1970-CDC-014, 2 Der. Civ. 27, 60-61 (1970); P.R. Civil Rights Commission Resolution (March 26, 1985).

The debates and discussion by the Puerto Rico Constitutional Assembly not only support this conclusion by the Puerto Rico Supreme Court, but also

reflect the Assembly's awareness of specific attempts to curtail privacy regarding telephone conversations. The delegates' purpose was to defeat these attempts. In response to a question by a delegate concerning the wiretapping provision as a specific component of a much broader right to privacy, another delegate answers:

> Mr. Benitez: . . . That is exactly so. In one case we have the generic principle of the autonomy of privacy, of the right of privacy, and in the other case there is a specific mention of the telephone because there have been concrete attempts to do violence on said privacy, and hence, we are specifically barring them.

3 Diario de Sesiones de la Convencion Constituyente, at 1586 (English version taken from the unpublished official translation by the Puerto Rico Supreme Court in P.R. Tel. Co., 114 P.R.Dec. at 340-341, n. 10).

It is not by chance that Puerto Rico guarantees a right to privacy greater than what is contemplated in the United States. It has been fully recognized by the Puerto Rico Supreme Court that the Constitutional Convention intended to establish in Puerto Rico a right to privacy much broader than the right to privacy that has been interpreted to emanate from the "penumbras" of the Bill of Rights of the U.S. Constitution. This broader right to privacy reflects cultural and historical differences between the framers of the U.S. and Puerto Rico constitutions, regarding their respective conceptualization of the nature of the individual. Additionally, the models for the Puerto Rico Constitutional Assembly were the Universal Declaration of Human Rights, December 10, 1978, G.A.R. 217A (III),

U.N. Gen. Ass. Off. Rec., 3rd Sess. Part 1, Resolutions, p. 71, and the American Declaration of Rights and Obligations of Man, Res. XXX, Ninth International Conference of American States, (Report of the Delegation of the U.S.), Department of State Pub. 3263 at 167-70 (1948), rather than the U.S. federal Constitution. See, P.R. Tel. Co., 114 P.R. Dec. at 338, Figueroa Ferrer v. E.L.A., 107 P.R.Dec. 250, 258-259 (1978); E.L.A. v. Hermandad de Empleados, 104 P.R.Dec. 436, 439-440 (1975); Cortes Portalatin v. Hau Colon, 103 P.R.Dec. 734, 738 (1975); Arroyo v. Rattan Specialties, 86 J.T.S. 20 (March 5, 1986).

The Puerto Rico Constitutional Right to privacy has been found to operate ex proprio vigore, and even to be applicable directly against private parties: Colon

v. Romero Barcelo, 112 P.R.Dec. 573 (1982); Sucesion de Victoria v. Iglesia Pentecostal, 102 P.R.Dec. 20 (1974). The right to privacy can be protected by an injunction, Sucesion de Victoria, 102 P.R.Dec. at 29-30. In cases where the right to privacy has been weighed against other Commonwealth constitutional rights, such as freedom of speech, E.L.A. v. Hermandad de Empleados, 104 P.R.Dec. at 446-447; Colon, 112 P.R.Dec. at 581-582; right to free exercise of religion, Sucesion de Victoria, 102 P.R.Dec. at 29-30; and property rights, Torres v. Rodriguez, 101 P.R.Dec. 177 (1973), it has been consistently favored.

Since 1953 the constitutional ban on wiretapping has been incorporated into the Penal Code of Puerto Rico, thus making unconsented wiretapping a felony. See P.R.Law Ann. 33 §4187 (1984). This

was a result of the understanding on the part of the Government of Puerto Rico that its commitment to the people of Puerto Rico regarding wiretapping was not only to refrain from wiretapping itself but to prevent any private person from wiretapping.

The explicit prohibition on wiretapping in Puerto Rico's constitution, which clearly expresses a fundamental value of Puerto Rican society must be recognized, under Sec. 734 of the Federal Relations Act, as rendering the wiretapping provisions of the Crime Control Act locally inapplicable.

B. The "Locally Inapplicable" Clause of the Federal Relations Act Should Be Interpreted To Afford Broad Deference And Respect Toward The Will of the Puerto Rican People As Expressed In Their Constitution.

The historical process which took place between Congress and the people of

Puerto Rico and which established the current relationship between the two countries created a unique relationship that must govern the interpretation of the Federal Relations Act locally inapplicable clause. Three points are particularly relevant here: 1) the Commonwealth of Puerto Rico is a result of a concerted effort by the Congress of the U.S. and the people of Puerto Rico to create what was then considered by some to be a more dignified and mutually respectful relationship; 2) neither of the parties to the Federal Relations Act can change the essential terms of U.S.-Puerto Rico relations unilaterally; and 3) the ban against wiretapping of Article II, §10 of the Commonwealth Constitution was analyzed, studied, accepted and approved by Congress along with the rest of that document. Pursuant to the

Federal Relations Act, and given its importance, Art. II, §10 must be considered an indispensable element of the compact between the two countries.

The Federal Relations Act is the statute that governs the relationship between Puerto Rico and the United States. Section 734 of this law, specifically provides in part that "(t)he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States." (emphasis added.) This legal disposition cannot be interpreted in a vacuum. First, notice should be taken that Public Law 600 (64 Stat. 314, 48 U.S.C. 731), which created the Puerto Rico Federal Relations Act was approved and "adopted in the nature of a compact",

48 U.S.C. §731(b).[1] It authorized Puerto Rico to organize a government based on a constitution of its own adoption.[2] Id. Article 4 of Public Law 600 provided that the Jones Act of 1917 would continue in force, except for certain provisions, and that it would be known as the Puerto Rico Federal Relations Act. Therefore, both the political negotiations process which took place between Puerto Rico and the Congress, and the constitutional document which was drafted by Puerto Ricans and reviewed by the Congress, are of paramount importance for the

[1] Black's Law Dictionary defines "compact" as: "an agreement; a contract. Green v. Biddle, 8 Wheat. 1, 92, 5 L. Ed. 546. Usually applied to conventions between nations or sovereign states." Black's Law Dictionary, 351 (4th ed 1968). See also discussion at B1 and B2 herein.

[2] It must be noted that the United States reserved for itself the right to approve any constitution adopted by the people of Puerto Rico.

interpretation of the "not locally inapplicable" clause.

Second, when interpreting the "not locally inapplicable" clause, special attention should be given to the unique situation of Puerto Rico within the United States framework, as recognized by this Court in Examining Board v. Flores de Otero, 426 U.S. 572 (1976) and the First Circuit in Cordova and Simonpietri Insurance Agency v. Chase Manhattan Bank, 649 F.2d 36 (1st Cir. 1981). This Court recently reiterated that:

> A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico. See, Diaz v. Gonzalez, 261 U.S. 102, 105-106... (1923) (Holmes, J.) ("This Court has stated many times the deference due to the understanding of local courts upon matters of purely local concern... This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which

> prevails here.") (citations omitted).

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 341, n.6 (1986). Similarly, deference is due to the interpretations of the Puerto Rico Constitutional Convention, Puerto Rico Supreme Court, Puerto Rico Legislature and the Puerto Rico Civil Rights Commission regarding the nature and scope of the Bill of Rights contained in the Commonwealth Constitution. This is especially so in light of the "compact" nature of Puerto Rico-U.S. relations, in which neither party can unilaterally alter its substantive terms.

1. **The History of the Relationship Between the U.S. and Puerto Rico Makes Clear That Statutes Contrary to Puerto Rico's Constitution Must Be Declared To Be Locally Inapplicable.**

During the first two years of control by the United States (1898-1900), Puerto Rico was governed by military and presidential authority. Santiago v. Nogueras, 214 U.S. 260 (1913). See also, 1 J. Trias Monge, Historia Constitucional de Puerto Rico, 163-164 (1st ed. 1980). Local pleas for an end to the military government forced Congress to undertake the task of creating and establishing a new regime. Bothwell, Transfondo Constitutional de Puerto Rico, Primera Parte, 1887-1914, 39 (3rd ed. 1971).

The Foraker Act, which superseded the military government, was approved on April 12, 1900. See, P.R. Laws.Ann. 1 §§1-41 (1982),(Historical Documents, at 37). The Foraker Act established that the laws approved by the Puerto Rico Legislature (newly established by that same Act) could be annulled or vetoed by

Congress. It also provided that the applicability of federal law was governed by the following section: "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter, provided, shall have the same force and effect in Porto Rico (sic) as in the United States, except the internal revenue laws which in view of the provisions of section three shall have the same force and effect in Porto Rico (sic)." P.R. Laws Ann. 1 §14.

Despite the Foraker Act, the constitutional relationship between Puerto Rico and the United States remained unclear. This Court tried, in the so-called "Insular Cases", to clarify the nature of the relationship. See e.g., DeLima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 182 U.S.

151 (1901) and Gonzalez v. Williams, 192 U.S. 1 (1903). From these cases it could be concluded that Puerto Rico was a territory belonging to, but not part of the United States.

In 1917, the Jones Act was approved, superseding the Foraker Act. The distinguishing characteristic of this legislation was the extension to the inhabitants of Puerto Rico of United States citizenship. Regarding the applicability of federal law, Article 14 of the Foraker Act was restated as Article 7 of the Jones Act. Although the Jones Act extended U.S. citizenship to Puerto Ricans, Puerto Ricans were never consulted regarding the change in their status. Puerto Rico was still a territory belonging to, but not a part of, the United States. Certain constitutional rights considered to be

fundamental rights (such as the right to vote), were not extended to it. Balzac v. People of Puerto Rico, 258 U.S. 298 (1922).

On February 10, 1943, the Puerto Rico Legislative Assembly approved Joint Resolution No 1 (Laws of Puerto Rico, 1943) in which it stated that it was the wish of the people of Puerto Rico to put an end to their colonial status and determine by special democratic and free elections their own political status. A permanent delegation to work on accomplishing the objectives stated in the Joint Resolution was subsequently created. On March 9, 1943, President Roosevelt recommended to Congress an amendment to the Jones Act in order to confer upon the people of Puerto Rico the right to elect their own governor and to establish clearly the functions and

authority of the Federal and Commonwealth Governments respectively. The President also created a commission to advise him in this regard. See, 1 J. Trias Monge, Historia Constitutional, at 280.

The Commission submitted to the President its recommendations in the form of a proposed bill. The first article of this proposed bill read:

> It is further declared to be the intention of Congress that no further changes in the Organic Act shall be made except with the concurrence of the people of Puerto Rico or their duly elected representatives

Id.

The bill was not enacted. In 1947, a new bill was prepared which was approved by Congress and subsequently signed by the President on August 5, 1947. The governor of Puerto Rico would be, for the first time in history, elected by the Puerto Rican people. See id. at 293-

315.

On March 13, 1950, Puerto Rico's Resident Commissioner Fernos-Isern presented to Congress a bill, H.R. 7674 81st Cong., 1st. Sess. (1950), to enable the people of Puerto Rico to organize a government pursuant to a Constitution of their own adoption. Articles 1 and 2 of that bill read:

> Upon the acceptance of this Act by the people of Puerto Rico and their adoption of a constitution, in accordance with procedures prescribed by the laws of Puerto Rico, the President of the United States is authorized to transmit such constitution to the Congress of the United States if he finds that such constitution conforms with the applicable provisions of this Act and of the Constitution of the United States.
>
> Fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact, and so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption. (emphasis added).

Quoted in III J. Trias Monge, Historia Constitutional de Puerto Rico, at 38-41. This bill was amended, approved by Congress, and was signed by President Truman on July 3, 1950, becoming Pub. Law 600 of the 81st Congress. 64 Stat. 319. The language establishing that the Act was adopted in the nature of a compact remained unchanged and established the alleged bilateral nature of the relationship between Puerto Rico and the United States.

To insure that the terms of the new relationship would truly be that of a compact, Pub. Law 600 established a novel procedure for the accomplishment of its objectives. First, the people of Puerto Rico would have to approve the terms it established through an island-wide referendum. Second, if approved by the people of Puerto Rico, then the Puerto

Rico Legislative Assembly would call a Constitutional Convention in order to frame a constitution. Third, after framing the constitution, the people of Puerto Rico had to adopt it before sending it to the President. Fourth, after its adoption by the people of Puerto Rico, the Constitution would be sent to the President, who would determine if the constitution was in accordance with Pub. Law 600 and the U.S. Constitution. Fifth, if the President found that the constitution was in accordance with the U.S. Constitution and Pub. Law 600, he would then send it to Congress for its approval.

This mechanism was designed to create an alleged compact between the government of the United States and the people of Puerto Rico, who were recognized as having a primary yet not decisive role to

play in the establishment of the new relationship. Congress did not merely seek to benevolently confer new political liberties upon Puerto Rico. It sought, with ample participation of the Puerto Rican people, to create what the United States government considered to be a more dignified and mutually respectful relationship between the United States and Puerto Rico. The United States government, however, retained the final right of approval.

The procedure established by Pub. Law 600 was rigorously followed. After the initial referendum, election of delegates, and the convention itself, the Constitution was sent to the President. It was accompanied by a Resolution stating, inter alia, that the people of Puerto Rico retained the right to propose and accept modifications to the terms of

their relationship with the U.S. so as to guarantee that the relationship would always be the free expression of a mutual agreement between the people of Puerto Rico and the United States. Resolution No. 22 of the Constitutional Convention, Historical Documents, P.R.Law Ann.1, Historical Documents at 147-149. The President and Congress of the U.S. received and were aware of this understanding which without question established that the terms of the relationship between Puerto Rico and the U.S. could not be unilaterally altered.

On April 22, 1952, President Truman sent the Constitution to Congress with his approval, stating:

> Through the act of July 3, 1950, providing for the establishment of a constitutional government in Puerto Rico, the United States gives evidence once more of its adherence to the principle of self-determination and its

> devotion to the ideals of freedom and democracy. The people of Puerto Rico have accepted the law as enacted by the Congress. They have complied with its requirements and have submitted their constitution for the approval of the Congress. With its approval, full authority and responsibility for local self-government will be vested in the people of Puerto Rico. The Commonwealth of Puerto Rico will be a government which is truly by the consent of the governed. No government can be invested with a higher dignity and greater worth than one based upon the principle of consent.
>
> The Constitution of the Commonwealth of Puerto Rico is a proud document that embodies the best of our democratic heritage. I recommend its early approval by the Congress. (emphasis added)

II J. Trias-Monge, at 272-273.

Later that year, the Puerto Rico Constitutional Convention accepted the

amendments proposed by Congress.[3]

2. Official Representations by the United States to the United Nations Confirm the Nature of the Compact and the United States Commitment to an Absolute Respect for the Commonwealth Constitution.

Representations made by the United States to the United Nations confirm and emphasize the importance of what the U.S. characterized as Puerto Rican self-government and the bilateral nature of the compact between the United States and Puerto Rico.

On January 19, 1953, the United States

[3] After public hearings and debates Congress conditioned final approval of the Constitution on the elimination of the sections establishing certain economic and social rights; amendment of the Commonwealth obligations within the broader right to education; and amendment of Article VII, Section 3 establishing that no amendment to the Constitution could conflict with the congressional resolution approving the Constitution, the U.S. Constitution, the Federal Relations Act or with Public Law 600 adopted in the nature of a compact.

formally requested that it be relieved of its obligations under Article 73(e) of the United Nations Charter regarding the classification of Puerto Rico as a non-autonomous territory, in light of the creation of the Commonwealth. In his speech of August 28, 1953 before the U.N. Commission on Non-Autonomous Territories, the U.S. representative called attention to the fact that the "Commonwealth constitution . . . constitutes a compact between the American people and the people of Puerto Rico. A compact, as you know, is much stronger than a treaty. A treaty generally can be renounced by either of the parties without the permission of the other." See, Fernos-Isern, Estado Libre Asociado de Puerto Rico, Antecedentes, Creacion y Desarrollo Hasta la Epoca Presente, at 234-235 (1974). The U.S. representative also

referred directly to the Puerto Rico district court decision in Mora v. Torres, 113 F. Supp. 309 (P.R.Dec. 1953), holding that neither the Congress nor the people of Puerto Rico can unilaterally alter the compact without the consent and approval of the other party.

Another U.S. delegate to the U.N., Ohio Congressman Francis P. Bolton, who was also a member of the House Committee on Foreign Affairs, stated before the U.N. Fourth Commission:

> A fundamental feature of the new constitution is that it was entered into in the nature of a compact between the American Congress and Puerto Rico. This arrangement has been described by Senator Butler of Nebraska, Chairman of the Senate Committee on Interior and Insular Affairs and co-sponsor of Public Law 600, as a relationship between two parties which may not be amended or abrogated unilaterally .
>
> ...(T)here exists a bilateral compact of association between the people of Puerto Rico and the

United States which has been accepted by both and which in accordance with judicial decisions may not be amended without common consent.

The nature of the relations established by compact between the people of Puerto Rico and the United States, far from preventing the existence of the Commonwealth as a fully self-governing entity, gives the necessary guarantees for the untrammeled development and exercise of its political authority. The authority of the Commonwealth is not more limited than that of any State of the Union; in fact, in certain aspects it is much wider . . .

The present status of Puerto Rico is that of a people with a constitution of their own adoption, stemming from their own authority, which only they can alter or amend. The relationships previously established also by a law of the Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent.

Quoted in IV J. Trias-Monge, Historia Constitucional de Puerto Rico, at 45-46 (1st ed. 1980).

The 8th U.N. General Assembly,

accepted the representations by the U.S. and relieved the U.S. of the obligation to transmit information regarding Puerto Rico.[4]

In its Resolution, the General Assembly stated that it:

3. Recognizes that the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status ...

4. Recognizes that, when choosing their constitutional and international status, the people of the Commonwealth of Puerto

[4] Notwithstanding this action, for the past 15 years the United Nations has continued to recognize Puerto Rico's colonial status. As recently as 1986, the United Nations Special Committee on Decolonization, created to implement the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples, resolved to keep the question of Puerto Rico status open for review.

Nonetheless, these subsequent developments at the U.N. do not alter the alleged pledge of greater self-determination for Puerto Rico made by the U.S.; a pledge to which the U.S. claims continued commitment.

Rico have effectively exercised their right to self-determination;

> 5. Recognizes that, in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity . . .

.

Based on representations made by the United States to the United Nations and on the U.N.'s response it is clear that all parties intended to commit themselves to a compact relationship of mutual respect, which at the very least, mandated absolute respect for the Puerto Rico Constitution. It is also clear that all parties involved understood that the provisions of the compact, of which the Constitution is unquestionably one, could not and can not be unilaterally altered

as application of the Crime Control Act's wiretapping provisions would do.

C. The Congress Can Not Abrogate Or Alter A Fundamental Clause of the Commonwealth Constitution.

The United Nations ratification of the U.S.-Puerto Rico compact was followed, in 1961, by a further recognition of the respect and deference to be accorded the Commonwealth and its legal order in this relationship. This took the form of an executive memorandum by President John F. Kennedy to all heads of departments and agencies which reads, in part:

> Because of the importance and significance of Puerto Rico in the relations of the United States with Latin America and other nations, it is essential that the executive departments and agencies be completely aware of the unique position of the Commonwealth, and that policies, actions, reports on legislation, and other activities affecting the Commonwealth should be consistent with the structure and basic principles of the Commonwealth . . . .

> The Commonwealth structure, and its relationship to the United Stats which is in the nature of a compact, provide for self-government in respect of internal affairs and administration, subject only to the applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act, and the acts of Congress authorizing and approving the constitution. . . .
>
> All departments, agencies, and officials of the executive branch of the Government should faithfully and carefully observe and respect this arrangement in relation to all matters affecting the Commonwealth of Puerto Rico....

Presidential Document No. 61-703 Fed. Reg. 6695 (1961).

In a speech to the Judicial Conference for the First Circuit on November 4, 1985, Puerto Rico Governor Rafael Hernandez Colon, Esq., eloquently amplified President Kennedy's point:

> Indeed, I submit that Commonwealth status and the compact relationship requires more deferential federal court supervision than that afforded the federated states. As

> the Supreme Court has suggested, the difference in language and culture between the two sovereignties make federal court deference to Puerto Rican law, and Puerto Rican political compromises, particularly appropriate. My contention does not rest on the general federalism claim of states and local governments . . . (f)or while federal courts may properly rely, in rejecting the federalism claim, on the states access to the political process. . .such reliance is inappropriate in the case of Puerto Rico.

47 Revista del Colegio de Abogados de Puerto Rico, Colon, Speech to the Judicial Conference of the First Circuit, at 13, (1985).

This Court has recently reaffirmed the autonomy inherent in the Commonwealth status. See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986). This autonomy does not mean that Congress cannot apply any legislation to Puerto Rico. Rather, it is the basis for the conclusion that

Puerto Rico constitutional law, while "like" that of a state, is in fact more autonomous and deserving of greater deference by the federal judicial system. See Posadas de P.R. Associates, 478 U.S. at 339-40.

By including the "locally inapplicable" language in the Federal Relations Act, Congress also recognized and accepted this greater degree of autonomy for Puerto Rico's constitutional law.[5] It is a central part of the

[5] P.R. Department of Consumer Affairs v. Isla Petroleum, 485 U.S. 495 (1988), is inapposite as it dealt with the preemption of Commonwealth statutory law by U.S. federal legislation and not preemption of a provision in Puerto Rico's Constitution, a law which holds a much higher status. To view this case otherwise would fly in the face of all representations made and obligations undertaken by the U.S. to respect Puerto Rico's constitutional law and alleged Puerto Rican self-government throughout the development of the current relationship between the U.S. and Puerto Rico.

structure of the Commonwealth relationship. It can not be limited without impermissibly distorting and undermining the basis of the U.S.-Puerto Rico compact.[6]

The U.S.-Puerto Rico compact relationship has been sealed. There can be no significant alteration of this relationship without bilateral participation and agreement. Thus, given the clear language of the Puerto Rican Constitution, the wiretapping provisions

[6] Case law which endow Congress with the power to apply legislation to Puerto Rico which has the effect of invalidating a component of the Commonwealth Constitution, must be overruled if representations made throughout the historical development of the current U.S.-Puerto Rico relationship are to be taken seriously. See e.g., Camacho v. Autoridad de Telfonos, 868 F.2d 482 (1st Cir. 1989) and U.S. v. Quinones, 758 F.2d 40 (1st cir. 1986).

of the Crime Control Act cannot apply to Puerto Rico merely because the Act states that it applies notwithstanding any other law. That surely would constitute the "monumental hoax" warned against by the First Circuit Court in Figueroa v. People of Puerto Rico, 232 F.2d 615 (1st Cir., 1956).

Any interpretation which maintains that the "locally inapplicable" phrase signifies that federal law applies to Puerto Rico insofar as intended by Congress, would mean that Congress reserved the right to unilaterally legislate upon Puerto Rico and change the terms of the compact. If so, Congress could legislate to completely annul the Commonwealth Constitution and return Puerto Rico to the even more precarious political status it occupied under the 1917 Jones Act. What then of the

position asserted by the U.S. before the United Nations, that all vestiges of colonialism have ended in Puerto Rico and that the compact, being stronger than a treaty, cannot be changed unilaterally by either of the parties? What about the compact itself? Was it an act of deceit by Congress upon the people of Puerto Rico? This Court should be mindful of these vital questions in its consideration of the issues in this case.

CONCLUSION

Extreme caution must be exercised when interpreting Congress' legislative powers vis-a-vis Puerto Rico when the viability of and alleged deference toward the Commonwealth Constitution, and U.S. Puerto Rico-relations are at stake. This is particularly so in the instant case wherein the wiretap provisions of the Crime Control Act, if made applicable to

P.R., have the effect of nullifying a fundamental provision in Puerto Rico's Constitution. The "locally inapplicable" term of the Federal Relations Act must be interpreted strictly. Puerto Rico's constitutional, historical, political, social and cultural uniqueness can render federal statutes locally inapplicable, regardless of the inclusion of Puerto Rico in their language. At a minimum, federal law must be found locally inapplicable in Puerto Rico when it runs contrary to an essential component of the Commonwealth Constitution. This is so because between 1947 and 1952, and through an extensive legislative and constitutional process, the United States President and Congress, and the people of Puerto Rico, agreed that it be so.

Accordingly, the judgment of the Court of Appeals for the Second Circuit should

be affirmed.

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